Supreme Court, U.S.
FILED

No. 09-574 NOV 5 - 2009

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In The

Supreme Court of the United States

JEANETTE GOODMAN, Individually
and as Personal Representative of the
Estate of Michael Goodman, Deceased,

Petitioner,

vs.

HARRIS COUNTY, TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) If a plaintiff alleges a claim of § 1983 municipal liability based upon the Constable's failure to supervise and ensure adequate training for deputy constables in the use of deadly force, can the reviewing court dismiss such a claim on a defense motion for summary judgment when the evidence demonstrates that said Constable did not ensure that such training was obtained by the deputy constable?

(2) If a plaintiff alleges a claim of § 1983 municipal liability based upon a county's failure to ensure adequate training for its deputy constables – commensurate with its sheriffs – in the use of deadly force, can the reviewing court dismiss such a claim on a defense motion for summary judgment when the evidence demonstrates that such training was not obtained by a deputy constable?

PARTIES TO THE PROCEEDING

The petitioner is: Jeanette Goodman, Individually and as Administratrix for the Estate of Michael Goodman, deceased.

The respondents are as follows: Harris County, Harris County Judge Robert Eckels, Harris County Commissioners El Franco Lee, Steve Radack, Jerry Eversole and Sylvia Garcia, Harris County Precinct Four (4) Constable Ron Hickman, and Former Deputy Constable Terry Ashabranner.

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COMES NOW, Petitioner Jeanette Goodman, Individually and as Administratrix of the Estate of Michael Goodman, and respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as 571 F.3d 388 (5th Cir. 2009), and is reproduced in the Appendix at App. 1. The opinion of the District Court granting respondents' Motion for Summary Judgment is not reported. However, it is reproduced in the Appendix at App. 27.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on or about June 9, 2009. The respondents filed a petition for rehearing, which was denied by the court of appeals on August 7, 2009. Pursuant to 28 U.S.C. § 1254(1), the jurisdiction of this Court is timely invoked by the petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides, in relevant part, that:

> "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983, involving the use of deadly force – under questionable circumstances – by a deputy constable without adequate or sufficient training.

On or about April 14, 2002, during an "alleged" traffic stop, Michael Goodman was shot and killed by Deputy Constable Terry Ashabranner, while attempting to ward off an attack by Ashabranner's canine, Nero. Ashabranner was the sole eyewitness to the events in question.

Jeanette Goodman, the mother of Michael Goodman, initially filed suit in state court against the following parties: Harris County, Harris County Judge Robert Eckels, Harris County Commissioners El Franco Lee, Steve Radack, Jerry Eversole and Sylvia Garcia, Harris County Precinct Four (4) Constable

Ron Hickman, and Ashabranner, alleging federal and state causes of action for the wrongful death of her son, Michael. The case was ultimately removed to federal court.

Despite overwhelming evidence that Ashabranner failed to obtain adequate training in the use of deadly force, the district court granted the defendants' motion for summary judgment and dismissed all of Goodman's claims against Harris County, Harris County Judge Eckels, the Harris County Commissioners and Precinct Four Constable Hickman and all claims against Ashabranner, except for the 42 U.S.C. § 1983 claim for excessive force.

Goodman's sole remaining issue – her § 1983 claim against Ashabranner – was tried to a jury and a verdict was returned in her favor.

In her appeal to the Fifth Circuit Court of Appeals, Goodman argued that Harris County was liable for failing to adequately train and supervise deputy constables in the use of deadly force. Goodman noted that in the last few decades, the roles of the deputy constables have greatly expanded beyond their original constitutionally recognized duties as "process servers." However, the training and supervision of the constables – particularly in the use of deadly force – has not kept pace with the additional duties now expected by the County. The deputy constables are expected to act as municipal peace officers; however, the County has done little to ensure that the specialized training necessary to carry out these new

functions is required or undertaken by the deputy constables.

Despite Goodman's arguments, demonstrating the County's lack of adequate training and specialized training for deputy constables, a three judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's grant of summary judgment in Harris County's favor, holding that Goodman: (1) failed to point to any policy or custom that lead to her son's death; (2) did not set forth any intentional choice made by Harris County; and (3) did not demonstrate any deliberate indifference on the part of Harris County to implement adequate policies and training for its deputy constables.

Finally, the Fifth Circuit affirmed the dismissal of § 1983 municipal liability against Constable Hickman, as well as County Judge Eckels and all of the County Commissioners.

REASONS FOR GRANTING THE PETITION

(1) The Fifth Circuit incorrectly applied the holding of *City of Canton v. Harris* and its progeny when it held that the petitioner did not provide evidence of any deliberate indifference on the part of Constable Ron Hickman, with regard to the supervision and training of his deputy constables.

Supervisory liability can be imposed without a determination of municipal liability. Accordingly,

separate discussions are provided on the liability of Constable Ron Hickman, as Deputy Ashabranner's supervisor and the liability of Harris County to ensure adequate training for deputy constables.

Supervisory liability is imposed against the individual, based on his or her personal responsibility for the constitutional violation and does not require any proof of official policy or custom as the "moving force" behind the conduct. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). "[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates." *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

In determining a supervisor's liability, the following are considered: "(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate's mental health care needs; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate." *Greason v. Kemp*, 891 F.2d 829, 836-37 (11th Cir. 1990) (finding this Court's analysis under *City of Canton v. Harris*, a helpful analogy in determining supervisor liability).

As the trial court and the Fifth Circuit Court of Appeals limited its discussion of "supervisor liability" to one issue – "deliberate indifference" – petitioner will address that issue solely.

A cursory review of the controverting summary judgment evidence provided by the petitioner shows proof of deliberate indifference, on the part of Constable Ron Hickman, to train and/or supervise his deputy constables, in this instance, Deputy Constable Ashabranner.

In *City of Canton v. Harris*, this Court, providing a reasoned discussion on the concept of "deliberate indifference," held that:

> The issue in a case like this one . . . is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.' It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. 378, 390 (1989).

In the instant matter, Goodman's response to the respondents' motion for summary judgment included an expert report which detailed the "evolving" role of the constables. For instance, the report noted that the office of the constables had been created for the purpose of "serv[ing] J.P. courts in criminal and civil processes." However, for a number of years the constables had become involved in patrol and investigative functions traditionally performed by municipal police or county sheriff's department personnel.

Accordingly, while there has been an increase in constables performing a significant number of police-related functions, there is little evidence that training opportunities have been enhanced or increased to meet these new demands. This is problematic for any number of reasons – the most likely being inexperienced officers with lethal weapons, charged with "protecting and serving."

> The nature of the police function is such that in all responsibly managed police departments, officers are required to undergo specialized training before they are assigned to street patrol. The need for sophisticated and thorough training in the area of the appropriate use of deadly force, for example, is well recognized. Police officers are given particularly sophisticated training in the area of split-second decision making, which

is frequently required in the use of deadly force.[1]

In the matter at bar, Hickman – as Ashabranner's ultimate supervisor – testified that the precinct had a policy on the use of deadly force, but was unable to provide any information on the training available to deputy constables. And while Ashabranner allegedly received instruction on various state and federal laws, as well as the Texas Commission on Law Enforcement Officer and Standards and Education (hereinafter "TCLEOSE") "Intermediate Use of Force," he had only one hour of training in the use of deadly force – a video program he watched almost five years prior to Goodman's death.

In the State of Texas, peace officers are required to complete four (4) hours of training on the use of deadly force; however, Ashabranner's one hour of instruction failed to satisfy even minimal standards of training.

It appeared – that for the purposes of Hickman – promulgation of a boilerplate manual on the use of deadly force – with no adequate training provided – should suffice to meet the increasing demands placed on the constable's office. It cannot.

A manual hardly qualifies as "adequate" training for individuals, who interact with the general public

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[1] Michael Avery, David Rudovsky, Karen Blum, *Police Misconduct: Law and Litigation*, § 4:21 (2007).

on a daily basis. A manual hardly qualifies as a substitute for the full four (4) hours of training on the use of deadly force that a certified instructor such as Ashabranner should have completed. Indeed, the sixty minutes of videotape that Ashabranner viewed is hardly training – considering the need for far more sophisticated training required of any police officer in the use of deadly force.

The Fifth Circuit's holding in this matter is remarkable when juxtaposed with its holding in *Brown v. Bryan County, OK*.[2] In *Bryan County*, the Fifth Circuit considered a jury verdict which found the county liable for the failure of its sheriff to provide any training to a reserve deputy, allowed to make arrests.

The reserve deputy, relatively young and inexperienced, used excessive force against the plaintiff, causing her severe injuries. *Id.* at 454. The Fifth Circuit upheld the verdict, noting that there was sufficient evidence of an obvious need to train the reserve deputy and of the obvious consequences to citizens if training was not provided. *Id.*

The court found that the sheriff's provision of *no* training and supervision was deliberate indifference to the rights of citizens. However, the sheriff's decision not to train the reserve deputy was the moving force behind the plaintiff's injuries. *Id.* at 458-59.

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[2] 219 F.3d 450 (5th Cir. 2000).

Remarkably though, the Fifth Circuit decision was grounded, not on whether the county had a policy of failing to train all its deputies, but rather on the failure to provide training and supervision to the reserve deputy in particular. In holding the single decision of the sheriff not to train the reserve deputy before allowing him to interact with the general public renders the county liable, the court relied on a footnote in *City of Canton* where this court stated that was a "moral certainty that police officers are required to arrest fleeing felons . . . when the city arms its officers to carry out this task, there is thus the obvious need to train officers in the constitutional limitations on the use of deadly force." *Id.* at 459 (*citing City of Canton*, 489 U.S. at 390, FN 10).

In the instant matter, there was a clear need on Hickman's part to provide adequate training to Ashabranner and other deputy constables in the constitutional limitations on the use of deadly force. A basic requirement of four (4) hours of training is hardly sufficient, considering the interaction with the general public that deputy constables will and must face daily. However, the one hour of training via video is nothing less than "grossly inadequate" when considering the recurrence of potential constitutional violation(s) by deputy constables. *See*, *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 738 (10th Cir. 1993) (discussing plaintiffs' expert's opinion that a training film was not an effective way for police officers to learn certain techniques).

Accordingly, the trial court erred when it dismissed Goodman's § 1983 "failure to train and supervise" claim against Hickman. Genuine issues of material fact existed as to each of the elements to be proven in Goodman's claim. Accordingly, the Fifth Circuit erred when it upheld the decision of the trial court to dismiss Goodman's § 1983 claim against Harris County.

(2) The Fifth Circuit incorrectly applied the holding of *City of Canton v. Harris* and its progeny when it held that the petitioner did not provide evidence of any deliberate indifference on the part of Harris County and its failure to implement training policies for its deputy constables, in the use of deadly force.

Municipal liability for the failure to train or supervise police officers arises only when "the failure to train [or supervise] amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378 (1989).

In order to succeed on a failure to train and supervise claim, a party must show that:

> (1) the training or . . . [supervising] procedures of the municipality's policymaker were inadequate, (2) the municipality's policymaker was deliberately indifferent in adopting the . . . training [or supervising] policy, and (3) the inadequate . . . training [or

> supervising] policy directly caused the plaintiffs' injury.

Conner v. Travis County, 209 F.3d 794, 796 (5th Cir. 2000).

A party may demonstrate that the training or supervising procedures were inadequate in one of two ways. First, a plaintiff or party can show that the municipality deliberately chose not to train or supervise its officers despite being on notice that its training and supervising regimen failed to prevent tortious conduct by its officers. *See*, *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000).

Second, under the "single incident exception," a single violation of federal rights may be sufficient to prove deliberate indifference. *Id.* However, the single incident exception requires proof that officers are placed in "recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training [or supervision]." *See*, *City of Canton*, 489 U.S. at 390, FN 10).

In the instant matter, Harris County's liability is predicated on its deliberate indifference to the need for policies and/or training programs for deputy constables in the use of deadly force.

As noted, *supra*, the role of the constables has changed considerably – from delivering the odd summons to now investigating crimes and effectuating arrest and search warrants.

However, while there are written policies in place – as it pertains to the use of deadly force – no evidence was provided by Harris County that specialized training in the use of deadly force had been instituted or required of the constables, particularly the deputy constables. Clearly then, Harris County acted with deliberate indifference to the need for such measures or policies on specialized training in the use of deadly force for its deputy constables.

Further, while much was made of the existence of written policies on deadly force, no evidence was produced by Harris County demonstrating measures to ensure that they were followed to the letter.

Clearly then, Harris County acted with deliberate indifference to the need for such measures, ensuring compliance with policies on the use of deadly force. The lack of policies – pertaining to training and compliance with standards on use of deadly force – resulted in Michael Goodman's death.

Without question, the trial court erred when it dismissed Goodman's § 1983 "failure to adopt policies" claim against Harris County. Genuine issues of material fact existed as to each of the elements to be proven in Goodman's claim. Accordingly, the Fifth Circuit erred when it upheld the decision of the trial court to dismiss Goodman's § 1983 claim against Harris County.

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CONCLUSION

For all of the foregoing reasons, Petitioner Jeanette Goodman respectfully requests that the Supreme Court of the United States grant her petition for writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20816

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ROBERT ECKELS, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner; RON HICKMAN, Harris County Precinct 4 Constable

Defendants-Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CV-4198

(Filed Jun. 9, 2009)

Before WIENER, DENNIS, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

This civil suit arises from the fatal shooting of Michael Goodman ("Michael") by Harris County, Texas, Deputy Constable Terry Ashabranner ("Ashabranner"). Jeanette Goodman ("Goodman"), Michael's mother, appeals from the district court's grant of summary judgment in favor of Harris County and Constable Ron Hickman ("Hickman") on her Texas Tort Claims Act ("TTCA") causes of action, and her 42 U.S.C. § 1983 claims. Ashabranner appeals from the jury verdict which awarded $5 million to Michael's estate. For the reasons set forth below, we affirm.

FACTS AND PROCEEDINGS

During his patrol of a rural area of Harris County, Texas, Ashabranner attempted to stop Michael who was riding his bicycle on the roadway. The parties dispute what happened next. Ashabranner claims that Michael ignored him as he attempted to approach and warn him of the unsafe condition of riding on the wrong side of the road without a light. Then, Michael allegedly assaulted Ashabranner, and fled on his bicycle. What is not in dispute is that Ashabranner released his canine, Nero, who pursued Michael. Ashabranner asserts that he saw Michael reach for a shiny object[1] in his pant's pocket when he attempted to rescue Nero whom Michael was allegedly trying to drown in standing roadside water.

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[1] A pair of pliers was later recovered from the scene.

Ashabranner ultimately shot Michael at close range, killing him.

Goodman, individually and as Administratrix of her son's estate, brought suit against eleven defendants alleging various federal and state law causes of action. Among these defendants, Goodman sued Harris County, Ashabranner's employer, and Hickman, Ashabranner's supervisor, seeking to hold them liable under the TTCA. The estate also raised several § 1983 claims against Harris County asserting deliberate indifference to formulating policies and training programs for its deputy constables in the use of deadly force, against Hickman for negligent supervision and training of Ashabranner, and against Ashabranner for excessive use of force. The defendants moved for summary judgment. The district court granted summary judgment on all but the § 1983 excessive use of force claim against Ashabranner. All other claims were dismissed. After an interlocutory appeal,[2] the case proceeded to trial on the sole individual-capacity claim against Ashabranner. The jury returned a verdict for Goodman, awarding $2

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[2] Ashabranner appealed the district court's denial of summary judgment on the basis of qualified immunity on the excessive use of force claim. This court determined that it lacked jurisdiction to hear the appeal. *Goodman v. Harris County*, 239 Fed. Appx. 869, 872 (5th Cir. 2007) (unpublished). The same appeal also contained Goodman's claims that the district court erred in granting summary judgment in favor of the defendants. Her appeal was likewise dismissed on jurisdictional grounds. *Id.* at 874-75.

million in compensatory damages and $3 million in punitive damages.

Ashabranner appeals from the jury verdict and Goodman appeals from the grant of summary judgment. Goodman argues that: 1) Harris County and Hickman are liable under the TTCA, 2) Hickman was not entitled to qualified immunity for failing to train and supervise Ashabranner, and 3) Harris County is liable for its deliberate indifference to the need for training. Ashabranner appeals from the jury verdict, arguing that: 1) the evidence was insufficient to support the jury verdict and overcome his qualified immunity, 2) the punitive damages verdict should be reversed, 3) the district court clearly abused its discretion in admitting expert testimony regarding his mental condition, and 4) the district court clearly abused its discretion in refusing to submit Ashabranner's proposed interrogatory to the jury.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "We consider the evidence in a light most favorable to [Goodman], the non-movant, but she must point to

evidence showing that there is a genuine fact issue for trial" to survive summary judgment. *Richardson*, 434 F.3d at 332.

"In reviewing the sufficiency of the evidence to support a jury verdict in a civil action, we must affirm unless there is *no* legally sufficient evidentiary basis for the jury's verdict." *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 445 (5th Cir. 2001) (internal quotation omitted). In this analysis, "the evidence, as well as all reasonable inferences from it, are viewed in the light most favorable to the verdict." *Id.* We reverse a district court's denial of a motion for a new trial only when "there is a clear showing of an abuse of discretion. To show an abuse of discretion in this respect, the defendant must show an absolute absence of evidence to support the jury's verdict." *Foradori v. Harris*, 523 F.3d 477, 498 (5th Cir. 2008).

The "granting or denying of a motion for a physical examination rests in the sound discretion of the trial court." *Coca-Cola Bottling Co. of P.R. v. Negron Torres*, 255 F.2d 149, 153 (1st Cir. 1958); *accord Bucher v. Krause*, 200 F.2d 576, 584 (7th Cir. 1953). "This court reviews evidentiary rulings for abuse of discretion and will reverse a district court's ruling only if it affects a substantial right of a party." *Caparotta v. Entergy Corp.*, 168 F.3d 754, 755-56 (5th Cir. 1999). The party asserting error bears the burden of proving substantial prejudice. *McDonald v. Steward*, 132 F.3d 225, 232 (5th Cir. 1998). Recently, we have underscored this rule, noting that, "[d]istrict courts enjoy wide latitude in determining the admissibility of

expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (citation omitted).

We review a district court's decision to submit a proposed interrogatory to the jury for abuse of discretion. *Moody v. FMC Corp.*, 995 F.2d 63, 66 (5th Cir. 1993).

DISCUSSION

I. Texas Tort Claims Act

Goodman argues that the district court erred in granting summary judgment in favor of Harris County and Hickman on her TTCA claims because, Goodman asserts, these arise out of the negligent and/or grossly negligent training and supervision of constables. Goodman seeks to hold Harris County and Hickman liable for claimed failures in their own right, not vicariously for Ashabranner's conduct.

The TTCA "creates a limited waiver of sovereign immunity." *Johnson v. Waters*, 317 F. Supp. 2d 726, 738 (E.D. Tex. 2004). Under the TTCA, "[a] governmental unit in the state is liable for: . . . personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Harris County is a

governmental unit. *See id.* § 101.001(3). The TTCA does not, however, include individuals under its definition of a governmental unit. *Id.* Individuals may not be sued under the TTCA as the act "does not govern suits brought directly against an employee of the State." *Huntsberry v. Lynaugh,* 807 S.W.2d 16, 17 (Tex. App.-Tyler 1991, no writ).

Furthermore, the TTCA does not apply to claims arising out of an intentional tort. TEX. CIV. PRAC. & REM. CODE § 101.057(2); *Waters,* 317 F.Supp.2d at 739. Also excluded from the TTCA are allegations against a governmental unit arising out of the same conduct that formed the basis of the intentional tort claims against its employee. *Tex. Dep't of Pub. Safety v. Petta,* 44 S.W.3d 575, 580 (Tex. 2001).

The TTCA is also not the appropriate vehicle for claims of negligent failure to train or supervise. *Id.* at 580-81. Such claims are not within the purview of the TTCA because "a plaintiff must allege an injury resulting from the 'condition or use of tangible personal or real property'" and "information is not tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualitites [sic]." *Id.* at 580.

Thus, the district court's dismissal of claims under the TTCA was proper because: 1) suits against individual state employees are not cognizable under the TTCA, *Huntsberry,* 807 S.W.2d at 17, and 2) failure to train or supervise is not a proper cause of action under the TTCA, *Petta,* 44 S.W.3d at 580.

II. Section 1983 failure to supervise and train

A. Hickman

Goodman renews her failure to supervise and train claim asserting that the district court erred in dismissing this cause of action against Hickman under 42 U.S.C. § 1983. Goodman argues that Hickman was liable for failing to train Ashabranner because it was this failure which resulted in the denial of Michael's constitutional rights.

Section 1983 provides a private cause of action against those who, under color of law, deprive a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Claims under § 1983 may be brought against persons in their individual or official capacity, or against a governmental entity. *See Board of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 403 (1997). Personal-capacity suits seek to impose liability upon a government official as an individual while official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dept. of Soc. Serv.'s of City of New York,* 436 U.S. 658, 690 n. 55 (1978). Thus, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham,* 473 U.S. 159, 166 (1985) (citation omitted).

In a personal-capacity suit, "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Id.* In such a suit, the official may "assert personal immunity defenses" such as qualified immunity. *Id.* (citing *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)). "The doctrine of qualified immunity shields government officials acting within their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Wallace v. County of Comal,* 400 F.3d 284, 289 (5th Cir. 2005). The process of evaluating qualified immunity requires two steps: "[t]he first step is to determine whether plaintiff alleged a violation of a clearly established constitutional right" and "[t]he second step requires determining whether . . . the official's conduct was *objectively* reasonable under clearly established law existing *at the time of the incident.*" *Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 490 (5th Cir. 2001) (emphasis in original).

In a § 1983 claim for failure to supervise or train, the plaintiff must show that: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Smith v. Brenoettsy,* 158 F.3d 908, 911-12 (5th Cir. 1998). "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that

a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 912 (internal quotation omitted). To establish deliberate indifference, "a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation." *Cousin v. Small,* 325 F.3d 627, 637 (5th Cir. 2003) (internal quotation omitted). Where a plaintiff fails to establish deliberate indifference, the court need not address the other two prongs of supervisor liability. *Estate of Davis ex rel. McCully v. City of N. Richland Hills,* 406 F.3d 375, 382 (5th Cir. 2005). Furthermore, "for a supervisor to be liable for failure to train, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Roberts v. City of Shreveport,* 397 F.3d 287, 293 (5th Cir. 2005) (quotations and citation omitted). Moreover, "for liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Id.*

Goodman does not specify whether her claims against Hickman arise in his official or personal capacity. Because official capacity suits are really suits against the governmental entity, Goodman's attempt to hold Hickman liable for failing to train and supervise Ashabranner, if in his official capacity, is subsumed within her identical claim against Harris County. Thus, her § 1983 claim against Hickman must be viewed as one asserted against him in his personal capacity if it is to survive independently.

As the district court determined, Goodman fails to set forth a § 1983 claim. Goodman has not shown that Hickman acted with deliberate indifference. Goodman admits that there was a policy on the use of deadly force and points to no pattern of violations or deficiencies in the training program. She merely states that some violations must have existed and these must have been due to a failure to train. This is not enough to carry her burden of showing deliberate indifference.

As Goodman's § 1983 claim fails because she has not shown deliberate indifference, we need not discuss the remaining prongs of supervisor liability. *Estate of Davis,* 406 F.3d at 382. For this same reason, an analysis of Hickman's defense of qualified immunity is unnecessary. Qualified immunity is only applicable as a protective shield once a plaintiff has made out a claim against an official acting in his individual capacity.

Thus, the district court did not err in granting summary judgment in favor of Hickman on Goodman's § 1983 claim.

B. Harris County

Next, Goodman raises her § 1983 claims against Harris County. She seeks to hold Harris County liable for failing to adequately train and supervise Ashabranner in the use of deadly force. She asserts that, while Harris County had a policy in place with respect to deadly force, it brought forth no evidence that

specialized training had been required or undertaken either for constables or canines.

Largely the same analysis and conclusions follow as outlined above with respect to Goodman's § 1983 claim against Hickman. As the Supreme Court has long held, we "require[ ] a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Brown,* 520 U.S. at 403. Furthermore, "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." *City of Canton v. Harris,* 489 U.S. 378, 389 (1989) (internal quotation and alteration omitted). "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id.*

Goodman has failed to point to any policy or custom that lead [sic] to her son's death. She has also failed to set forth any intentional choice made by Harris County and shows no deliberate indifference on the part of Harris County to the need for policies and training. Rather, Goodman admitted that Harris County had training policies and procedures but asserted that the county provided no evidence that these policies were actually followed. As previously noted, the burden is on Goodman to show deliberate indifference. She has provided no evidence with respect to training deficiencies. Goodman only speculates

that the policies may not have been followed. This is insufficient for municipal liability.

Thus, the district court did not err in its grant of summary judgment in favor of Harris County.

IV. Sufficiency of the evidence

Ashabranner argues that the jury verdict should be overturned because, if Ashabranner's account of the night Michael died is to be believed, no constitutional violation occurred. As the sole surviving eyewitness to the incident, Ashabranner argues that Goodman can do no more than attack his credibility but can provide no contradictory evidence. He further asserts that an officer who later arrived on the scene corroborated his testimony that Michael had a shiny object in his pant's pocket and that this object may have looked like a weapon from Ashabranner's vantage point. Thus, he maintains that he was reasonable in his belief that Michael might pose a threat and the use of deadly force was necessary.

To establish a claim under § 1983 for excessive use of force, a plaintiff must first show that he was seized. *Flores v. City of Palacios,* 381 F.3d 391, 396 (5th Cir. 2004). Next, he must show: "(1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Id.*

As the Supreme Court stated in *Graham v. Connor,* "[i]n addressing an excessive force claim brought

under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." 490 U.S. 386, 394 (1989). *Connor* held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. Thus, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. (internal quotation omitted). The determination of "reasonableness" under the Fourth Amendment is "not capable of precise definition or mechanical application . . . [but] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (internal quotation omitted). The Court went on to explain that, "[a]s in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 397.

An officer who faces suit based on an alleged § 1983 violation may raise the defense of qualified immunity. *Graham,* 473 U.S. at 166. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Connor,* 490 U.S. at 396.

Turning to the substance of the § 1983 excessive use of force claim before the jury, the parties do not dispute that Michael had been seized. Ashabranner also makes no claim that Michael's death was not an injury caused directly by his use of force. He only asserts that the use of force was reasonable under the circumstances. With respect to the defense of qualified immunity, Ashabranner also does not dispute that Goodman alleged a violation of a clearly established constitutional right – the use of excessive force in violation of the Fourth Amendment – arguing only that the use of force was reasonable and therefore did not violate the Constitution. Thus, with respect to both the § 1983 use of force claim and the qualified immunity defense, the issue at hand is whether Ashabranner's conduct was reasonable and whether the jury had evidence on which to base its verdict that it was not.

Despite Ashabranner's forceful contentions that the jury had no evidence upon which to disbelieve his account of the shooting, his testimony faced numerous challenges. Ashabranner claimed that Michael pushed him and the two struggled in the mud, also noting that pictures from that night showed that his

uniform was wet and soiled. Yet, forensic evidence from the scene indicated that Ashabranner's uniform was not muddied and footprints in the area were equally consistent with a scene trafficked by the response team that later arrived as with the altercation described by Ashabranner. Furthermore, Ashabranner's testimony that Michael pushed him and attempted to drown Nero was contradicted by medical evidence and witness testimony that Michael's right arm was "virtually useless" due to a gun-shot wound suffered only three months prior which had not yet healed. Michael also had severe lesions and bite-marks all over his body which were consistent both with protective wounds as with an attempt to drown Nero. While Ashabranner argued that he saw Michael reach for a shiny object in his right back pocket and a pair of pliers was later recovered from the scene, evidence that the mobility of Michael's right arm was limited contradicted this version of events. Further contradiction came in the form of the vantage point from which Ashabranner claimed to have observed the object. The jury heard testimony that it would have been impossible for Ashabranner to have seen anything from the claimed view-point. The jury also heard expert evidence that Ashabranner's approach to the incident was improper and correct tactics would have avoided the entire situation.

Because "[w]e accept all credibility choices that tend to support the jury's verdict" *United States v. Anderson,* 933 F.2d 1261, 1274 (5th Cir. 1991), it is clear that a reasonable jury could conclude that

Ashabranner's use of force was not reasonable under the circumstances known to him at the time of the incident. Ashabranner repeatedly asserts that his testimony, "if believed," would preclude recovery for Goodman but there is no requirement that the jury ignore all evidence to the contrary and rely on Ashabranner's version of events alone. In fact, we have long held that "juries are free to choose among all reasonable constructions of the evidence." *United States v. Charroux,* 3 F.3d 827, 831 (5th Cir. 1993) (internal quotation omitted). A reasonable jury could find that it was unreasonable for a constable to react with deadly force to a disabled suspect who was attempting to protect himself from the officer's canine. There was sufficient evidence to challenge Ashabranner's version of events and to find that Ashabranner was not entitled to qualified immunity as his conduct was unreasonable. *Bazan,* 246 F.3d at 490.

The threshold for reversing a jury verdict in a civil action requires a court to find that the jury's verdict has "*no* legally sufficient evidentiary basis." *Lane,* 241 F.3d at 445 (quotation omitted). The jury had ample evidence on which to base its verdict. Therefore, we decline to disturb the jury verdict.

V. Punitive damages award

Ashabranner argues that the jury's punitive damages award should be reversed. He lists this argument as one of the "issues presented for review" but fails to brief it. Because "claims . . . not briefed on

appeal . . . [are] waived," Ashabranner has waived this claim. *Gates v. Tex. Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 438 (5th Cir. 2008).

VI. Expert testimony regarding Ashabranner's mental condition

Ashabranner seeks to overturn the jury verdict arguing that it was error to allow the psychological examination of his mental condition and that the district court abused its discretion by allowing Dr. Jay Tarnow ("Dr. Tarnow"), the psychiatrist who performed the evaluation, to testify. He argues that Dr. Tarnow's testimony was highly prejudicial, inflammatory, and irrelevant. Ashabranner further maintains that this testimony went beyond the proper scope of expert opinion because Dr. Tarnow testified with respect to Ashabranner's veracity and credibility. Based on these assertions of error, Ashabranner seeks a new trial.

When a party's "mental or physical condition . . . is in controversy" the court may order that party "to submit to a physical or mental examination by a suitably licensed or certified examiner." FED. R. CIV. P. 35. Such an order "may be made only on motion for good cause." *Id.*; *see also Schlagenhauf v. Holder*, 379 U.S. 104, 121-22 (1964). A party seeking to introduce expert testimony must show that: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles

and methods reliably to the facts of the case." FED. R. EVID. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-94 (1993). "When evaluating expert testimony, the overarching concern is whether or not it is relevant and reliable." *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007). With respect to the proper scope of expert testimony, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. Nevertheless, an expert may never render conclusions of law. *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996). Nor, may an expert go beyond the scope of his expertise in giving his opinion. *First United Fin. Corp. v. U.S. Fid. & Guar. Co.*, 96 F.3d 135, 136 (5th Cir. 1996) (noting that expert testimony was properly rejected by the court because the "opinion of dishonesty goes beyond the scope of expertise.")

Ashabranner makes broad conclusory assertions that the district court should not have granted Goodman's motion for a psychiatric evaluation. As the district court pointed out, it allowed the evaluation to level the playing field because Ashabranner had indicated that he intended to prove what happened on the night of the shooting through the use of psychological evidence of Michael's mental state. This is not an abuse of discretion.

Ashabranner's assertions of error with respect to Dr. Tarnow's testimony are likewise weak and, accordingly, fail. Ashabranner does not challenge Dr.

Tarnow's qualifications or methodologies, asserting only that Dr. Tarnow's testimony was not relevant and went beyond his professional opinion. A review of the record reveals that Dr. Tarnow's testimony was both relevant and within the proper scope of expertise. Dr. Tarnow limited his testimony to noting his professional observations of Ashabranner. Those observations included a diagnosis that Ashabranner showed cognitive weaknesses, some short-term memory problems, and attention span limitations. Dr. Tarnow nowhere concluded or testified that, as a result of the deficiencies he observed, Ashabranner fabricated any or all of his testimony. Because Ashabranner's case was premised almost exclusively on his own testimony, whether Ashabranner suffered from any limitations that may have affected his ability to accurately recall the night Michael died was highly relevant.

The most damaging testimony offered by Dr. Tarnow was that he observed inconsistencies in Ashabranner's account of the night he shot Michael and that Ashabranner exhibited anger-management problems and impulsive behavior. Based on Ashabranner's own statements, Dr. Tarnow described Ashabranner's anger at being defied by Michael who allegedly refused to stop when Ashabranner approached. Dr. Tarnow then gave his medical opinion that, based on his psychological analysis, Ashabranner overreacted to Michael, saw Michael as a "bad guy," and precipitated the confrontation through impulsive actions. Dr. Tarnow merely recounted what Ashabranner had

described and gave his medical opinion on the psychological underpinnings of those descriptions. This testimony was relevant because it helped the jury understand Ashabranner's view of Michael that night and aided in the determination of whether Ashabranner's decision to shoot was objectively reasonable. Furthermore, Dr. Tarnow never opined that Ashabranner was lying but only presented the jury with the fact that he observed inconsistencies.

Even accepting Ashabranner's argument that some of Dr. Tarnow's testimony went beyond its proper scope, the error was harmless. *United States v. Achobe,* 560 F.3d 259, 268-69 (5th Cir. 2008) (noting that any error with respect to the admissibility of evidence was harmless given the amount of evidence produced). As previously outlined, the jury was presented with forensic, physical, and medical evidence that contradicted Ashabranner's account. Thus, it cannot be said that "[t]his is the unusual case where a new trial is needed because a full and fair presentation of the claims was impeded at trial, and substantial prejudice resulted." *Nichols v. American Nat. Ins. Co.,* 154 F.3d 875, 890 (5th Cir. 1998) (granting a new trial where erroneous evidentiary rulings so altered the course of trial as to deny a party a fair and impartial presentation of her case). Ashabranner has failed to carry his burden of proving that he suffered substantial prejudice.

Thus, the district court's evidentiary rulings with respect to Dr. Tarnow were proper as the court did not abuse its discretion in allowing the testimony.

VII. Jury instruction sought by Ashabranner

Ashabranner seeks a new trial because the district court refused to submit his proposed interrogatory to the jury. The interrogatory he proposed, Ashabranner argues, set forth the second prong of qualified immunity – whether no reasonable officer could have believed that the use of deadly force against Michael was lawful. While admitting that the district court instructed the jury on qualified immunity, Ashabranner argues that, by failing to set forth a specific interrogatory on the second prong of qualified immunity, the district court committed an abuse of discretion.

"In determining whether a jury instruction is erroneous, this court determines whether the charge as a whole is a correct statement of the law and whether it clearly instructs the jury on the law applicable to the facts." *United States v. Ibarra-Zelaya,* 465 F.3d 596, 607 (5th Cir. 2006). We look to the following factors in determining whether the jury instructions were proper: "(i) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury; (ii) whether the submission of the issues to the jury was 'fair'; and (iii) whether the 'ultimate questions of fact' were clearly submitted to the jury." *Barton's Disposal Serv. Inc. v. Tiger Corp.,* 886 F.2d 1430, 1435 (5th Cir. 1989) (citing *Dreiling v. Gen. Elec. Co.,* 511 F.2d 768, 774 (5th Cir. 1975)). Abuse of discretion is established if these factors are not met. *Id.* As previously noted, the defense of

qualified immunity is a two-step inquiry: the allegation that a "clearly established constitutional right" was violated and the determination that "the official's conduct was *objectively* reasonable under clearly established law existing *at the time of the incident.*" *Bazan,* 246 F.3d at 490.

The jury was asked: "Do you find by a preponderance of the evidence that Defendant Deputy Constable Terry Ashabranner's use of force was clearly excessive to the need and was objectively unreasonable." The jury answered "Yes." Ashabranner sought the following interrogatory: "Do you find, from a preponderance of the evidence that no reasonable officer possessing knowledge of clearly established law and the information known by Deputy Ashabranner on April 14, 2002, could have believed that his use of force against Michael Goodman on April 14, 2002 was lawful?"

A plain reading of the jury instruction belies Ashabranner's assertion of error. The instruction asks whether the use of force was objectively unreasonable, the very requirement set forth in step two of the qualified immunity analysis – the step Ashabranner now argues that the district court ignored. Furthermore, as Ashabranner admits, the district court instructed the jury on the defense of qualified immunity. Thus, when taken as a whole, it cannot be said that the district court failed to properly set the ultimate issues of fact before the jury.

The district court therefore did not abuse its discretion.

CONCLUSION

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20816

D.C. Docket No. 4:03-CV-4198

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ED EMMETT, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; JERRY EVERSOLE, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner, RON HICKMAN, Harris County Precinct 4 Constable

Defendants-Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

(Filed Jun. 9, 2009)

Before WIENER, DENNIS, and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant-cross-appellee pay to defendant-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W. Goodman, deceased,	§	
Plaintiff,	§	**CIVIL ACTION NO. H-03-4198**
versus	§	
HARMS COUNTY, ET AL.,	§	
Defendants.	§	

ORDER

(Entered Aug. 29, 2005)

Pending before the Court are Defendants' Motion for Summary Judgment **(Instrument No. 77)**, filed on December 15, 2004; Defendants' Objections, Motion to Strike, and Reply to Plaintiff's Response to Motion for Summary Judgment **(Instrument No. 85)**, filed on January 11, 2005; and Defendants' Objection and Motion to Strike Exhibit to Plaintiff's Supplemental Response **(Instrument No. 90)**, filed on January 31, 2005.

I.

Plaintiff Jeanette Goodman ("Mrs. Goodman"), individually and as Administratrix of the estate of Michael W. Goodman, filed this civil rights lawsuit in

Texas state court, and the cause was removed to this Court by Defendants. (Instrument No. 1). Plaintiff sues Harris County; Harris County Judge Robert Eckels ("Judge Eckels"); Harris County Commissioners El Franco Lee ("Commissioner Lee"), Steve Radack ("Commissioner Radack"), Jerry Eversole ("Commissioner Eversole"), and Sylvia Garcia ("Commissioner Garcia"); Harris County Precinct 4 Constable Ron Hickman ("Hickman") and Deputy Terry Ashabranner ("Ashabranner"), in their official and individual capacities; Drew Carter ("Carter"), individually and in his official capacity; the Texas Department of Criminal Justice; and the Texas Department of Public Safety. (Instrument No. 27). Plaintiff alleges that Michael W. Goodman's Fourth, Fifth, Eighth, and Fourteenth Amendment rights were violated when he was shot and killed by Defendant Ashabranner on April 14, 2002. (Instrument No. 77, at 1, 5, 10). Plaintiff brings this suit pursuant to 42 U.S.C. § 1983 and the Texas Tort Claims Act ("TTCA"), codified at Tex. Civ. Prac. & Rem. Code § 100.001, *et seq.* (*Id.*, at 5, 7). Plaintiff is Mr. Goodman's mother. (Instrument No. 82, Exhibit 3, at 2).

On April 14, 2002, Michael Wayne Goodman ("Goodman" or "Decedent") was riding his bicycle on or near the 13,000 block of Kuykendahl Road in Harris County, Texas. (Instrument No. 27, at 6). Plaintiff alleges that Goodman "was not violating any laws when he was unlawfully stopped by [Ashabranner], who caused and ordered his trained vicious attack dog to attack Decedent." (*Id.*). Plaintiff contends that

Goodman was stopped unlawfully, without probable cause. (*Id.*, at 7). Plaintiff alleges, further, that, "[w]hile decedent was trying to ward off the dog's attack, Ashabranner shot Decedent a number of time[s], the results from which Decedent ultimately died." (*Id.*, at 6). Plaintiff argues that "the attack dog knowingly, obediently and savagely attacked Decedent, on orders from his trainer, Ashabranner, without provocation, causing Decedent numerous serious and painful bites on his body before Defendant wrong fully [*sic*] shot Decedent with his service pistol." (*Id.*). Plaintiff argues that Goodman tried to escape the dog's attack by riding away on his bicycle. (*Id.*, at 7). Plaintiff contends that the "attack dog" was trained by and was under the control of "his trainer-owner-maintainer Ashabranner or any other Defendant who trained, owned and controlled such dog." (*Id.*). Plaintiff alleges, finally, that Ashabranner shot Goodman "a number of times either intentionally without cause or grossly negligently when, as Ashabranner has alleged, falsely, Decedent tried to harm the dog but not harm Ashabranner, while the Decedent was being savagely attacked by the dog." (*Id.*).

Plaintiff also alleges that Ashabranner committed an obstruction of justice after the incident by planting a gun in a nearby puddle or water-filled ditch "to imply that the deceased was armed, when in truth in fact [*sic*] he was not ever armed." (*Id.*, at 13). Plaintiff claims that Ashabranner and Defendant Hickman were "deliberately indifferent to the deceased and to his serious medical condition; no ambulance or

EMS Emergency Medical Services or the nearest Fire Department that was called was equipped and trained to render emergency first aid and treatment until he could get to the nearest hospital or even Defendants' LBJ public hospital service." (*Id.*). Plaintiff alleges that Ashabranner and Hickman intended to delay the medical treatment. (*Id.*, at 14).

Defendants allege a very different set of facts. Defendants claim that, on April 14, 2002, Ashabranner was on duty, "working his assigned shift as a K-9 unit in the Precinct 4 Patrol Division from 10:00 p.m. to 6:00 a.m." (Instrument No. 77, at 5). Defendants claim that Ashabranner was dressed in a regulation K-9 officer's uniform and was driving a distinctively marked white patrol vehicle. (*Id.*). Defendants state that Ashabranner observed an individual riding a bicycle "southbound in the northbound lane" in the 13800 block of Kuykendahl Road, while Ashabranner was driving northbound on Kuykendahl. (*Id.*). Allegedly, the "bicyclist was riding on the wrong side of the roadway, directly at Deputy Ashabranner in his traffic lane. Deputy Ashabranner was forced to swerve out of his lane to avoid hitting the bicyclist." (*Id.*).

Ashabranner allegedly noted that the bicyclist "was wearing very dark clothing and that he was riding in the roadway without any kind of light on his bicycle." (*Id.*, at 6). Defendants allege that this conduct violates Section 551.04 of the Texas Transportation Code. Accordingly, "Deputy Ashabranner decided to stop and make contact with the bicyclist,

who was later identified as Michael Goodman. Deputy Ashabranner's purpose in deciding to contact Mr. Goodman was to warn him of the consequences of driving recklessly in the dark, without the appropriate lighting equipment, and of driving on the wrong side of the roadway." (*Id.*). Ashabranner allegedly considered Mr. Goodman's actions to be dangerous and felt they could lead to an accident. (*Id.*).

Defendants claim that, after passing Goodman, Ashabranner turned his vehicle around and drove up to Goodman's left side. (*Id.*). Ashabranner noted that Goodman was a white male wearing a large backpack, dark gloves, and "all over dark clothing." (*Id.*). Allegedly, "Ashabranner lowered his front passenger window and informed Mr. Goodman that no one could see him out in the street," but Goodman gave no verbal response and continued to look straight ahead as he rode. (*Id.*). Defendants claim that Ashabranner found these actions to be "suspicious and unusual and that Ashabranner "knew he had probable cause to stop Mr. Goodman, and he decided to investigate further." (*Id.*, at 6-7). Ashabranner pulled off the side of the road and got out of his car to talk to Goodman, who had stopped his bike by the time Ashabranner got out of his vehicle. (*Id.*, at 7). Ashabranner directed questions toward Goodman, regarding his "riding behavior," but Goodman did not respond and would not make eye contact. (*Id.*). Goodman made as if to get back on his bicycle, and Ashabranner allegedly observed "some type of tool or object of some type" in

Goodman's right rear pants pocket. (*Id.*). Ashabranner thought the object "posed an immediate threat to his safety" and decided to frisk Goodman. (*Id.*, at 7-8).

Before Ashabranner could conduct the frisk, Goodman allegedly either hit or pushed Ashabranner, knocking the officer to the ground. (*Id.*, at 8). Goodman then pushed his bicycle under a barricade that the patrol vehicle could not pass and rode away. (*Id.*). Ashabranner yelled for Goodman to stop and, when Goodman did not stop or respond, Ashabranner allegedly told Goodman he would release his K-9, Nero, if Goodman did not stop. (*Id.*). Ashabranner then released Nero and commanded Nero to "apprehend" Goodman. (*Id.*). Nero took after Goodman and made "contact" with him, while Ashabranner followed on foot. (*Id.*, at 9). When Ashabranner caught up to Goodman and Nero, Goodman was "lying in a puddle of water with Nero attempting to apprehend him." (*Id.*). Ashabranner alleges that Goodman too [sic], hold of Nero's mouth and nose and was holding Nero underwater, yelling, "'I'm gonna kill your dog, I'm gonna kill your dog!'" (*Id.*, at).

Ashabranner yelled that he would call Nero off if Goodman would release him, but Goodman did not release the dog. (*Id.*). So, Ashabranner knelt on the ground, grabbed Goodman and pulled Goodman and Nero out of the water. (*Id.*). Ashabranner noted that Goodman "was bleeding, probably from dog bites." (*Id.*). Goodman released Nero and turned toward Ashabranner. (*Id.*). Ashabranner then alleges that Goodman pushed Ashabranner with his left hand,

causing Ashabranner to drop his handcuffs. (*Id.*, at 10). Goodman then allegedly "reached back with his right hand and appeared to be drawing or pulling the weapon or object" that was in his right rear pocket. (*Id.*). Ashabranner then "pulled his firearm and shot Mr. Goodman to stop the threat of serious bodily injury or death he was sure was imminent." (*Id.*). All of these allegations are supported only by Ashabranner's own affidavit.

After the shooting, Ashabranner allegedly radioed the Precinct 4 dispatcher "within seconds of shooting Mr. Goodman." (*Id.*, at 10). Ashabranner then remained with Goodman until other officers arrived. (*Id.*). Defendants note that, at this point, Goodman was not handcuffed. (*Id.*). Defendants allege that Deputy Constable Steve Cupit arrived at the scene "shortly after the shooting" and "observed Mr. Goodman laying on his back and attempting to turn onto his left side. As Mr. Goodman attempted to turn, Deputy Cupit observed a pair of pliers in his rear right pant pocket." (*Id.*, at 25 n.4).

Goodman was, then, taken by Life Flight to the hospital. (Instrument No. 77, Exhibit B, at 2). The Court has not been provided with the name of the hospital to which Goodman was taken, the time he was taken, nor any information regarding Goodman's time of death.

Plaintiff makes relevant allegations in her affidavit, signed on December 31, 2004. (Instrument No. 82, at 1). Mrs. Goodman states in her affidavit that

Goodman was taking medication for "Attention Deficit, Hyper-activity Disorder or ADHD," by which Goodman had allegedly been "afflicted" since the age of six. (*Id.*, at 2). Mrs. Goodman also alleges that her son "had received a gun shot wound to his dominant right arm less than four months prior to this incident. He had almost no use of it, and hoping to recondition himself and regain his stamina was the principle reason he had taken up bicycling." (*Id.*). Mrs. Goodman claims that Goodman was very clumsy as a result of not being able to use his right hand and contends that "in the condition Michael was in, he couldn't have overpowered an adult man, much less a trained Deputy, who was younger, stronger, taller, bigger and better equipped than Michael." (*Id.*, at 2-3).

Defendants' version of the incident in their briefing includes no mention of a gun found at a later time. In his affidavit, Constable Hickman states, "I understand that after the shooting, a weapon was recovered at the scene by Texas Ranger Andrew Carter. I have no personal knowledge of the finding of the weapon by Ranger Carter, the manner in which the weapon came to be located at the scene, nor the ownership of the weapon." (Instrument No. 77, Exhibit B, at 6). Defendants make no arguments, however, with regard to any gun found at the scene.

There are several other individual Defendants named in this suit. Constable Ronald Gene Hickman ("Hickman") is the duly elected Constable for Harris County Precinct 4 and is a licensed peace officer for

the State of Texas. (Instrument No. 77, Exhibit B, at 1). Hickman states in his affidavit, signed December 15, 2004, that he was at home when notified that Deputy Ashabranner had shot a suspect. (*Id.*, at 2). Hickman claims that he arrived at the scene after Goodman had been removed and transported by Life Flight to the hospital. (*Id.*). Hickman states that he played no part whatsoever in the incident between Ashabranner and Goodman. (*Id.*, at 2-3).

Plaintiff filed this lawsuit in Texas state court, and the cause was removed to this Court by Defendants. (Instrument No. 1). Plaintiff filed a First Amended Complaint on April 13, 2004.[1] (Instrument No. 27). Plaintiff brings suit seeking damages against all Defendants for the wrongful death of Goodman, for survivor damages, "which Decedent would and did sustain if he had survived," and for deprivation of Decedent's civil rights, pursuant to § 1983. (*Id.*, at 7). Plaintiff also seeks damages pursuant to the Texas Tort Claims Act ("TTCA"), and argues that Defendants have waived all immunity under the TTCA. (*Id.*, at 7-8).

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[1] Plaintiff filed a First Supplement to First Amended Complaint and/or Second Amended Complaint (Instrument No. 37) on May 7, 2004. On March 28, 2005, the Court issued an Order (Instrument No. 120) striking the First Supplement to First Amended Complaint from the record. Accordingly, Plaintiff's First Amended Complaint (Instrument No. 27) is the live pleading.

Essentially, Plaintiff alleges that the constitutional violations at issue in this case include failing to advise the Decedent of his rights; depriving Decedent of those rights, such as the right to talk to an attorney, the right of privacy, and the right to be free from Ashabranner's "wrongful, intentional acts and actions." (*Id.*, at 10). Plaintiff argues that Ashabranner's acts were due to insufficient training and/or experience. (*Id.*, at 11). Plaintiff also faults Defendants for the failure to obtain a search or arrest warrant; the allegedly excessive, deadly force used by Ashabranner; the failure to provide "necessary, immediate life-saving medical care;" the failure to promulgate any policies for the evacuation of Decedent; the deliberate indifference of the Defendants toward Goodman's medical needs; Ashabranner's alleged failure to pursue or use alternative, non-fatal action; Ashabranner's obstruction of justice in allegedly planting a gun nearby "to imply that the deceased was armed;" and employing Ashabranner at all when his immediate employer "should have known of Ashabranner's incompetence and prior uses of excessive force." (*Id.*, at 11-15).

In addition to the constitutional violations alleged, Plaintiff accuses the Defendants of conspiracy pursuant to § 1983. (*Id.*, at 16). Plaintiff claims that Defendants "acted together to accomplish an unlawful object, i.e., to deprive Deceased of his above federally and safe protected Constitutional rights, privileges and immunities." (*Id.*). Plaintiff also asserts a claim, pursuant to the TTCA, for utilizing

"personal property to inflict the damages on Decedent to wit: (1) the dog; (2) Ashabranner's gun in a negligent or grossly negligent fashion, for all of which, Defendants would be liable if such injuries and death were proximately caused by a non-governmental person under the same or similar facts and circumstances as set forth herein." (*Id.*, at 8).

Plaintiff seeks actual damages for pecuniary loss, loss of companionship and society, mental anguish, damages to Decedent's estate, and exemplary damages. (*Id.*, at 17-20). Plaintiff also seeks attorneys' fees and costs of court. (*Id.*, at 20). Finally, Plaintiff makes a timely jury demand. (*Id.*). On April 30, 2004, Defendants Harris County, Judge Eckels, Harris County Commissioners Lee, Radack, Eversole, and Garcia, Constable Hickman, and Deputy Ashabranner filed an Original Answer to Plaintiff's Amended Complaint. (Instrument No. 31). These Defendants assert three affirmative defenses. First, the Defendants argue that the Defendants sued in their individual capacities are entitled to absolute, qualified, and official immunity. (*Id.*, at 5). Second, the Answering Defendants "specifically and affirmatively plead and claim all of the exemptions and exceptions from and limitations on liability" contained in Chapter 101 of the Texas Civil Practice and Remedies Code. (*Id.*). Third, Defendant Harris County and all Answering Defendants in their official capacities assert the defenses of sovereign immunity and/or governmental immunity. (*Id.*).

On October 14, 2004, the Court issued an Order dismissing Defendants Drew Carter, the Texas Department of Public Safety, and the Texas Department of Criminal Justice. (Instrument No. 60). Accordingly, the Defendants remaining in this cause are Harris County, Judge Eckels, Commissioner Lee, Commissioner Radack, Commissioner Eversole, Commissioner Garcia, Constable Hickman, and Deputy Ashabranner.

The remaining Defendants filed this Motion for Summary Judgment on December 15, 2004. (Instrument No. 77). After summarizing the facts, Defendants assert a handful of arguments in support of their motion. First, Defendants argue that Judge Eckels and the Harris County Commissioners Lee, Radack, Eversole, and Garcia (the "Commissioners") are entitled to summary judgment. (*Id.*, at 11). Defendants state that Plaintiff has sued Judge Eckels and the Commissioners, in both their official and individual capacities, for aiding and abetting a conspiracy with Ashabranner and Constable Hickman "by their alleged acquiescence in Precinct 4's policies and manner of supervision of Deputy Ashabranner." (*Id.*). Defendants argue that Judge Eckels and the Commissioners are entitled to summary judgment because there is no evidence of any conspiracy and no evidence that Judge Eckels and the Commissioners "took any action in this matter whatsoever or even had any knowledge of the incident between Deputy Ashabranner and Michael Goodman." (*Id.*).

Defendants also argue that Judge Eckels and the Commissioners did not acquiesce in the Precinct 4 Constable's office policies, procedures, or manner of supervision of Ashabranner. (*Id.*, at 12). Defendants contend that Judge Eckels and the Commissioners lack authority to control an elected official, such as Constable Hickman, or to control the operation of the Constable's office. (*Id.*). In addition, Defendants claim that neither Judge Eckels, Harris County, nor the Commissioners had authority to fire Constable Hickman, discipline him, or require him to enact or change precinct policies. (*Id.*). In sum, Defendants argue that Harris County, Judge Eckels, and the Commissioners are, therefore, entitled to judgment as a matter of law. (*Id.*, at 13).

Next, Defendants argue that Harris County is entitled to summary judgment because Plaintiff "cannot establish that Deputy Ashabranner's allegedly wrongful conduct was committed pursuant to a policy, custom or practice of a final Harris County policymaker. Specifically, Plaintiff cannot establish that Constable Hickman is a final policymaker for Harris County as a matter of law." (*Id.*, at 16). In addition, Defendants contend that Plaintiff's failure to train theory must fail because Plaintiff cannot prove a "'deliberate' or 'conscious' choice to endanger constitutional rights." (*Id.*, at 17). Defendants argue that Plaintiff cannot provide enough evidence to prove that Ashabranner was inadequately trained. (*Id.*, at 18).

With regard to the claims against Defendant Ashabranner, Defendants argue that Ashabranner is entitled to summary judgment because he has asserted the defense of qualified immunity. (*Id.*, at 19). Defendants argue that Ashabranner did not violate Mr. Goodman's rights and that a reasonable officer would not have known that Ashabranner's actions were unlawful, if in fact they were. (*Id.*). Defendants then argue that there is no evidence to support Plaintiff's excessive force claim under the Fourth Amendment. (*Id.*, at 21). Defendants argue that an officer may use deadly force when threatened with a weapon, when confronted with the threat of serious physical harm, or when necessary to prevent a suspect's escape. (*Id.*, at 20-21). Defendants then restate the factual summary derived from Ashabranner's affidavit (*Id.*, at 21-25) and conclude, "The question is whether Mr. Goodman posed an immediate threat to Deputy Ashabranner when he was shot, and this question can only be answered yes." (*Id.*, at 25). Defendants argue that Ashabranner "observed a tool or some type of object in Goodman's right rear pant pocket" and "had been trained on the concept of action versus reaction." (*Id.*). Defendants contend, therefore, that if Ashabranner had waited to confirm whether or not the "tool" in Goodman's pocket was a weapon, it would have been too late. (*Id.*). Defendants assert that Ashabranner used deadly force as a last resort and that his actions were objectively reasonable when judged "in the moment," (*Id.*, at 25-26). Defendants argue, "The objective evidence indicates that Deputy Ashabranner followed

his law enforcement training when he stopped Mr. Goodman based on probable cause for the violation of Texas Transportation Code Section 551.104," and that the totality of the circumstances at that point were "extremely suspicious." (*Id.*, at 25-26).

Defendants then argue that the § 1983 claim based on deprivation of medical care should be dismissed because Goodman's due process rights to medical care were not violated. (*Id.*, at 28). Defendants state that the "evidence is that Life Flight was summoned to the scene, and Mr. Goodman [was] transported as soon as possible." (*Id.*). In addition, Defendants argue for the dismissal of the § 1983 claim based on Ashabranner's alleged failure to obtain an arrest warrant. (*Id.*). Defendants assert than an arrest warrant is not necessary for an offense committed in an officer's presence. (*Id.*). Defendants then argue that Plaintiff's claim based on Ashabranner's alleged failure to read Goodman his *Miranda* rights or to permit him to consult an attorney should be dismissed because "Plaintiff can produce no evidence to demonstrate that these rights had attached in the situation." (*Id.*, at 29). Defendants also seek dismissal of Plaintiff's claim related to the "planted gun," arguing that the claim "is outrageous and is totally unsupported by any evidence whatsoever." (*Id.*). Defendants then seek dismissal of the claim that Ashabranner and Hickman conspired to deprive Goodman of his constitutional rights. (*Id.*). Defendants state that there is no evidence to support the claim. (*Id.*). Defendants also

argue that Plaintiff's claim based on Goodman's constitutional right to privacy should be dismissed because there is "no evidence that any such right had attached in the situation." (*Id.*).

Defendants then shift to another set of claims and argue that the claims against Judge Eckels, the Commissioners, and Constable Hickman in their individual capacities should be dismissed because "[t]here is absolutely no basis upon which any of these Defendants can be held liable to Plaintiff in their individual capacities." (*Id.*, at 29-30). Defendants contend that the claims against Judge Eckels, the Commissioners, Constable Hickman, and Deputy Ashabranner in their official capacities should also be dismissed because "an official capacity suit is, in all respects, to be treated as a suit against the entity." (*Id.*, at 30). Defendants assert that the claims against these individuals in their official capacities are redundant because their liability is "coextensive with that of Harris County." (*Id.*). Defendants argue, therefore, that those claims should be dismissed. (*Id.*).

Finally, Defendants assert that they are entitled to summary judgment on Plaintiff's Tort Claims Act claims. (*Id.*). Defendants argue, first, that the TTCA claim against Ashabranner in his individual capacity should be dismissed, pursuant to the Texas Civil Practices and Remedies Code. (*Id.*, at 31). Second, Defendants argue that Plaintiff "cannot pursue a negligence claim under the Tort Claims Act based on a single event which is also alleged as a civil rights violation under Section 1983." (*Id.*). Defendants

attach the affidavits of Deputy Ashabranner, Constable Hickman, Commander Albert Rodriguez, Jared Zwickey, and Deputy Steve Cupit. (*Id.*, Exhibits A-E). Commander Rodriguez is the Commander of the Training Academy for the Texas Department of Public Safety. (*Id.*, Exhibit C, at 1). The Court notes that, while Defendants address Plaintiff's Fourth and Fifth Amendment arguments (Instrument No. 77, at 2, 20), they fail to address Plaintiff's Eighth or Fourteenth Amendment claims in their motion.

Plaintiff filed her Response to Defendants' Motion for Summary Judgment on January 3, 2005. (Instrument No. 82). First, Plaintiff addresses the TTCA claim regarding the use of Nero. (*Id.*, at 4). Plaintiff argues that Nero is "a known vicious, supposedly trained but unrestrainable Belgian Malinois, not under physical restraint as required by Precinct 4 Harris County Standard Operating Procedures." (*Id.*). Plaintiff contends that the use of Nero violated these Standard Operating Procedures and that Nero "is personal property in Texas." (*Id.*). Plaintiff argues that the "unleashing of a vicious known dog [*sic*] states a Texas cause of action for which private person [*sic*] would be liable under" the TTCA or the Texas Civil Practice and Remedies Code. (*Id.*, at 5). Plaintiff asserts that, therefore, there is a cause of action against Defendants because a governmental unit may be liable for personal injury or death caused by use of tangible personal property if a private person would have been liable for the same action. (*Id.*, at 4-5).

Second, Plaintiff argues that Defendant Harris County has failed to meet its initial burden regarding "ruling out as a matter of law at least all essential elements of all material fact issues with respect to their Qualified Immunity defensive issues which has the burden to show that no material factual disputes are raised." (*Id.*, at 8). Plaintiff also argues that Harris County has not met its burden on at least one element of Plaintiff's causes of action under the Fourth Amendment, the TTCA, and the Texas Civil Practice and Remedies Code, regarding Goodman's "clearly established alleged constitutional rights." (*Id.*). Plaintiff, then, contends that even if Plaintiff has the burden of showing these violations, "Defendants have failed as a matter of law to show no facts [*sic*] of deprivation or violation of the deceased Michael Goodman's constitutional rights under the Fourth and Fifth Amendments." (*Id.*).

Third, Plaintiff reviews the admissible summary judgment evidence provided by Plaintiff's former pleadings and the affidavits and depositions attached to her response. (*Id.*, at 9). Plaintiff contends that the summary judgment evidence proves violations of the Standard Operating Procedures on canine use; that Nero was not under any physical control of Ashabranner by the electronic leash; that Nero was disobedient and difficult to control; and that Nero had a pattern of prior disobedience and "up to 6 incidents where Nero would not come off a 'bite and hold.'" (*Id.*, at 10). Plaintiff asserts that "Nero was almost 200 feet away [from Ashabranner] chasing and biting

severely and repeatedly clawing Goodman in a dark remote undeveloped area out of sight and/or control of Ashabranner." (*Id.*). Plaintiff also asserts that the summary judgment evidence proves that, while a K-9 is a non-lethal option, it is a force option which should not be used excessively. (*Id.*, at 11). Plaintiff argues that Ashabranner "inexcusably placed himself in such a position of imminent jeopardy" and that Ashabranner "should never have put himself in such [a] perilous position, especially if he suspected Goodman was armed." (*Id.*). Plaintiff contends that Goodman was not an immediate physical threat to Ashabranner when Ashabranner released Nero to chase Goodman, and that Nero should have been on a physical leash. (*Id.*, at 12).

Fourth, Plaintiff argues that Ashabranner failed to use non-lethal alternatives before employing the lethal force he used. (*Id.*, at 12-13). Plaintiff argues Nero should have performed the "find and bark" or the "bite and hold" methods and should have been on a physical leash. (*Id.*, at 13). Plaintiff does not define the "find and bark" and the "bite and hold" methods. Plaintiff also argues that an electronic leash is not effective, "especially on 'Nero' a recalcitrant, non-obedient dog." (*Id.*).

Fifth, Plaintiff argues that Ashabranner's use of force was objectively unreasonable. (*Id.*, at 16). Plaintiff argues that, under Supreme Court and Fifth Circuit precedent, Ashabranner did not behave reasonably. (*Id.*, at 16-18). Sixth, Plaintiff argues that a denial of Defendants' motion will preclude

interlocutory appeal. (*Id.*, at 18-19). Plaintiff states that the preclusion of an interlocutory appeal is in the interest of judicial economy. (*Id.*, at 19). Despite a four-page discussion of the inability to bring an interlocutory appeal regarding evidentiary disputes at the summary judgment stage, the Plaintiff fails to make the relevance of this line of argument clear to the Court. (*Id.*, at 19-22).

Plaintiff's additional arguments include a long list of contentions that are not tied to any specific claims. Plaintiff asserts,

> Ashabranner was never at all remotely seriously injured physically. He does not claim to have been at any time. This even though he claims (after his attorney consult), that being touched, or pushed, constituted a technically defined felony against a police officer. He has not claimed physical injury or that it was even life threatening except for a knife or other vague metal object in [Goodman's] back pocket, never found.

(*Id.*, at 22-23). Plaintiff also claims that "it is disputed legally and factually whether or not Ashabranner had authority to arrest Goodman, at least for the initial minor misdemeanor traffic violations." (*Id.*, at 23). Beyond this statement, however, the Plaintiff makes no argument and cites to no authority in support of the contention.

Plaintiff argues that Ashabranner failed to "warn Goodman before killing him." (*Id.*). Plaintiff contends that Ashabranner's warning that Goodman should

release the dog and Ashabranner would call the dog off "cuts 'strongly against a finding on summary judgment that Ashabranner's actions were objectively reasonable.'" (*Id.*, at 24).[2]

Plaintiff also argues that Ashabranner's actions were not objectively reasonable under Supreme Court precedent because,

> "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."

(Instrument No. 82, at 24-25) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). Plaintiff does not

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[2] The quotation in this sentence refers, according to Plaintiff, to the dissenting opinion in *Colston v. Barnhart*, 130 F.3d 96, 103 (5th Cir. 1997). (*Id.*). While Plaintiff's treatment of the quote makes it appear that the case directly discusses Deputy Ashabranner and his actions, the Court notes that the true text of the dissent in *Colston* states, "Regardless, Barnhart's failure to give a warning, which he was obliged to give, if feasible, before the use of deadly force against Colston, cuts strongly against a finding on summary judgment that Barnhart's actions were objectively reasonable." 130 F.3d at 103 (internal citations omitted).

argue, however, how the facts of *Garner* relate to the facts of this case, nor does Plaintiff argue how the legal conclusions of the Supreme Court should *affect* this Court.

Finally, Plaintiff argues that Judge Eckels and the Commissioners are liable in their official capacities

> . . . by reason of the allegations and causes of action and theories set forth and summary judgment evidence of conspiracy under § 1983; and 20 and (2) under the Texas Tort Claims Act, ante, "TTCA" § 101.025 nondiscretionary functions; and/or pleads and fails to conclusively establish every essential element of its affirmative defense. This includes "qualified immunity" above; acting in bad faith; and negligent implementation of policies where all claims of sovereign or official immunity are waived under the limited exceptions pled above and supported by admissible summary judgment evidence; and § 1983's " . . . under color of law."

(Instrument No. 82, at 25) (internal citations omitted).

Attached as exhibits to Plaintiff's response are (1) the docket sheet for this case; (2) the "Controverting Affidavit of Robert H. 'Tim' Phillips"; (3) the curriculum vitae of Robert H. "Tim" Phillips; (4) excerpts from the deposition of Robert H. "Tim" Phillips; (5) the "Converting Affidavit of Harold Warren" [*sic*]; (6) Harold Warren' curriculum vitae;

and (7) the "Converting Affidavit of Jeannette Goodman" [*sic*]. (Instrument No. 82, Exhibits 1, 1-A, 1-B, 1-C, 2-A, 2-B, 3). Included in the Harold Warren affidavit is a letter dated June 30, 2004, from Mr. Warren to Plaintiff's counsel. (Instrument No. 82, Exhibit 2-A, at 13).

On January 11, 2005, Defendants filed their Objections, Motion to Strike, and Reply to Plaintiff's Response to Motion for Summary Judgment. (Instrument No. 85). First, Defendants object to the evidence submitted by Tim Phillips regarding Nero, on the ground that "Plaintiff and Mr. Phillips have judicially admitted that Mr. Phillips is not an expert on the use of canines in law enforcement" and is not qualified to give many of the opinions stated in his affidavit. (*Id.*, at 1-2). Defendants also contend that portions of Phillips's affidavit are irrelevant or are hearsay. (*Id.*, at 2). Defendants also object to portions of Harold Warren's affidavit and Jeanette Goodman's affidavit on the basis of hearsay. (*Id.*).

Defendants then move to strike the letter from Harold Warren to Plaintiff's counsel, stating that the letter is not the same copy as was submitted previously to Defendants. (*Id.*, at 3). Defendants attach the "copy of the Expert Report of Harold Warren which was originally provided to Defendants" to the motion. (*Id.*). Defendants claim that the "originally provided" report was the one used to examine Mr. Warren during his deposition. (*Id.*). Defendants move to strike the report on the ground that it was not

previously provided to Defendants and on the basis of hearsay. (*Id.*, at 4).

Defendants' Reply essentially restates all of their previous arguments from the motion for summary judgment. (*Id.*, at 4-19). Defendants argue that Plaintiff has not provided the evidence to support any of her various claims against the Defendants. Defendants contend that Plaintiff has failed in her response to defeat any of Defendants' arguments for summary judgment.

On January 12, 2005, one day after filing their objections, motion to strike, and reply, Defendants filed a Supplement to Their Objections, Motion to Strike, and Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment. (Instrument No. 86). The supplement includes Exhibits A and B, which referred to in their prior filing but which Defendants had "inadvertently failed to attach" to the brief. (*Id.*, at 2).

On January 14, 2005, Defendants filed a Second Supplemental Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment. (Instrument No. 87). In the Second Supplement, Defendants refer the Court to a Fifth Circuit opinion issued on January 13, 2005, which Defendants argue is "on point with this case." (*Id.*, at 1). Defendants then proceed to analyze the opinion in the case, *Roberts v. City of Shreveport*, 397 F.3d 287 (5th Cir. 2005), and apply it to the facts of the case at bar. (*Id.*, at 2-4). In essence, Defendants argue that *Roberts* supports

their arguments with regard to Constable Hickman's liability for failure to train or supervise Ashabranner, and with regard to Ashabranner's failure to give a warning prior to using deadly force. (*Id.*, at 3-4).

On January 26, 2005, Plaintiff filed her Supplemental Response to (1) Defendants' Objections, Motion to Strike, and Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment; and (2) Defendants' Second Supplemental Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (Instrument No. 89) (the "Supplemental Response"). Plaintiff argues that *Roberts v. City of Shreveport* is easily distinguished from this case. (*Id.*, at 2). In support of this argument, Plaintiff attaches "expert Harold Warren's factual response to aid the Court in her Honor's determination of these motions." (*Id.*). Plaintiff explains this highly unusual tactic, stating,

> This response by former Dallas Texas Assistant Police Chief Harold Warren, CCP was his prepared and unedited responses based upon his previously recorded documented familiarity with the many listed depositions, pleadings and documents which are a part of the Plaintiff's Summary Judgment Record in this case.
>
> Since it is prepared and written by an experienced law enforcement officer and testifying expert in this case, apologies are offered to his language including any that is not in legal jargon. It is filed because of the

> Defendants [*sic*] two above noted subsequent recent January, 2005 responses to Plaintiff's Responses filed January 3, 2005.

(*Id.*). Attached to the brief is a letter from Harold Warren, CCP, to Plaintiff's counsel, dated January 25, 2005. (*Id.*, Exhibit 1). The four-page letter is signed by Mr. Warren, who calls himself a "Public Safety Consultant," but it is not sworn to, certified, or notarized. (*Id.*). Mr. Warren has been designated by Plaintiff as an expert in this case.

On January 31, 2005, Defendants filed an Objection and Motion to Strike Exhibit to Plaintiff's Supplemental Response. (Instrument No. 90). Defendants object to the admission of the January 25, 2005 letter from Mr. Warren "as unsworn, and inadmissible pursuant to Rule 802, Federal Rules of Evidence" and "on the ground that Plaintiff's time in which to file a Response to Defendants' Motion for Summary Judgment has passed." (*Id.*, at 2).

Since this flurry of filings, the Court has received two other related submissions from Plaintiff. On April 22, 2005, Plaintiff's counsel brought the April 19, 2005 opinion in *Baldwin v. Placer County,* 405 F.3d 778 (9th Cir. 2005), to the Court's attention. The opinion in that case has been amended and superseded on denial of rehearing by *Baldwin v. Placer County,* ___ F.3d ___, 2005 WL 1863322 (9th Cir. Aug. 8, 2005). Then, on May 31, 2005, Plaintiff's counsel brought the May 25, 2005 opinion in *Tarver v. City of Edna,* 410 F.3d 745 (5th Cir. 2005), to the Court's

attention. And that, at last, concludes the Court's summary of the summary judgment-related filings in this case.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. If the evidence rebutting the motion for summary judgment is only colorable or is not significantly probative, summary judgment should be granted. *See Id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). The summary judgment procedure, therefore, enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those

portions of the record that demonstrate such absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586-87 (quoting FED. R. CIV. P. 56(e)) (emphasis in original). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir. 1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson*, 477 U.S. at 242; *see also Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue.").

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir. 2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

III.

On October 14, 2004, the Court issued an Order dismissing Defendants Drew Carter, Texas Department of Public Safety, and Texas Department of Criminal Justice. (Instrument No. 60). Accordingly, the Defendants remaining in this cause are Harris County, Judge Eckels, Commissioner Lee, Commissioner Radack, Commissioner Eversole, Commissioner Garcia, Hickman, and Ashabranner. The Court addresses three of Defendants' pending motions, in turn. With regard to the motion for summary judgment, the Court addresses the three sets of claims – for conspiracy pursuant to § 1983, for damages under the TTCA, and for other violations of § 1983 – in turn.

A.

On January 31, 2005, Defendants filed an Objection and Motion to Strike Exhibit to Plaintiff's Supplemental Response. (Instrument No. 90). Defendants object to the admission of the January 25, 2005 letter from Mr. Warren "as unsworn, and inadmissible pursuant to Rule 802, Federal Rules of Evidence" and "on the ground that Plaintiff's time in which to file a Response to Defendants' Motion for Summary Judgment has passed." (*Id.*, at 2).

The issue is a simple one: unsworn documents are not competent summary judgment evidence. *See* Fed. R. Civ. P. 56(e); *Martin v. John W. Stone Oil Dist.*, 819 F.2d 547, 549 (5th Cir. 1987). Accordingly,

Defendants' Motion to Strike Exhibit to Plaintiff's Supplemental Response **(Instrument No. 90)** is **GRANTED**.

B.

On January 11, 2005, Defendants moved to strike the expert report of Harold Warren, attached to Plaintiff's Response to Defendants' Motion for Summary Judgment. (Instrument No. 85, at 3). Defendants move to strike the expert report on the grounds that it was not previously provided to Defendants. (*Id.*, at 4). Defendants also argue that the report should be stricken because it is hearsay. (*Id.*).

The Court notes that the Harold Warren letter provided to Defendants (Instrument No. 86, Exhibit A) (the "original Warren letter") and the Harold Warren letter attached to Plaintiff's Response (Instrument No. 86, Exhibit B) (the "second Warren letter") are different letters. The second Warren letter has clearly been altered in several places. Both letters, however, are dated June 30, 2004. This fact suggests a certain amount of misrepresentation to the Court on the part of the Plaintiff.

The Court finds that Defendants' concern is well-founded. The letter attached to Plaintiff's response is materially different from the letter provided to Defendants and Bates-stamped "Goodman 00025." Accordingly, the Motion to Strike **(Instrument No. 85)** is **GRANTED**. The Court will rely only upon the

original Warren letter, attached as Exhibit A to Defendants' motion to strike.

C.

Plaintiff asserts a claim for conspiracy, pursuant to 42 U.S.C § 1983, against all Defendants. (Instrument No. 27, at 16). Plaintiffs allege that Defendants

> acted together to accomplish an unlawful object, i.e., to deprive Deceased of his above federally and safe protected Constitutional rights, privileges and immunities; they had a meeting of their minds of these objects and/or courses of action; they committed one or more unlawful, overt acts in furtherance of such conspiracy and the Plaintiff and the decedent suffered injuries and his death as a proximate result thereof. . . . Defendants Harris County and Defendants Commissioners, individually and as County Commissioners duly elected, aided and abetted in this conspiracy by the acquiescence in the foregoing policies and non enforcement [*sic*] of such supervision of such Constables and their deputies prior to the occurrence made the basis of this suit above.

(*Id.*, at 16-17). Plaintiffs never allege facts or provide evidence to support most of these allegations, such as the meeting of minds, the overt acts in furtherance of conspiracy, the acquiescence of policies, or the aiding and abetting of the conspiracy.

Defendants argue that they are entitled to summary judgment on the conspiracy claim because there is no evidence of any conspiracy. (Instrument No. 77, at 11). Defendants argue that there is no evidence that Judge Eckels and the Commissioners "took any action in this matter whatsoever or even had any knowledge of the incident between Deputy Ashabranner and Michael Goodman." (*Id.*). Defendants also argue that Judge Eckels and the Commissioners did not acquiesce in the Precinct 4 Constable's office policies, procedures, or manner of supervision of Ashabranner. (*Id.*, at 12). Defendants contend that Judge Eckels and the Commissioners lack authority to control an elected official, such as Constable Hickman, or to control the operation of the Constable's office. (*Id.*). In addition, Defendants claim that neither Judge Eckels, nor the Commissioners had authority to fire Constable Hickman, discipline him, or require him to enact or change precinct policies. (*Id.*). In sum, Defendants argue that Judge Eckels, and the Commissioners are, therefore, entitled to judgment as a matter of law on the conspiracy claim. (*Id.*, at 13). Defendants also argue that there is no evidence to support the claim that Ashabranner and Hickman took part in a conspiracy to deprive Goodman of his constitutional rights. (*Id.*, at 29).

Plaintiff does not address the conspiracy claim in her response except to argue that Judge Eckels and the Commissioners are liable in their official capacities

> . . . by reason of the allegations and causes of action and theories set forth and summary judgment evidence of conspiracy under § 1983; and 20 and (2) under the Texas Tort Claims Act, ante, "TTCA" § 101.025 non-discretionary functions; and/or pleads and fails to conclusively establish every essential element of its affirmative defense. This includes "qualified immunity" above; acting in bad faith; and negligent implementation of policies where all claims of sovereign or official immunity are waived under the limited exceptions pled above and supported by admissible summary judgment evidence; and § 1983's " . . . under color of law."

(Instrument No. 82, at 25) (internal citations omitted).

First, the Court notes that there is no relief for a conspiracy pursuant to § 1983. When "conspiracy" is discussed in relation to § 1983, it is with regard to whether a private person can be found to act "under color of' state law by being "engaged in a conspiracy with state officials to deprive another of federal rights." *Tower v. Glover*, 467 U.S. 914, 919-20 (1984) ("Glover's conspiracy allegations 'cast the color of state law over [petitioners'] actions.'"). *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931 (1982); *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) ("Ballard asserts that the attorneys were 'state actors' for purposes of § 1983 because they conspired with Judge Lambert to imprison him unconstitutionally.").

A claim for conspiracy to deprive a person of rights and privileges is properly brought pursuant to 42 U.S.C. § 1985(3). Plaintiff filed this suit October 7, 2003 and has, therefore, had ample time to discover her failure to bring the conspiracy claim under the proper statute. Plaintiff, despite having amended her complaint, has never amended it to include a claim pursuant to § 1985(3). Accordingly, summary judgment should be granted on Plaintiff's conspiracy claim.

Even if the Court were to consider the conspiracy claim against these Defendants under § 1985(3), however, the claim would fail. To establish liability for conspiracy under § 1985, a plaintiff must establish: (1) a conspiracy; (2) that the purpose of the conspiracy was to deprive a person of equal protection of the laws, or to deprive a person of his privileges and immunities under the laws; (3) that an act was committed in furtherance of the conspiracy; and (4) that an injury occurred as a result. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-04 (1971); *Horaist v. Doctor's Hospital of Opelousas*, 255 F.3rd 261, 270 (5th Cir. 2001). In this case the Plaintiff has failed to allege any evidence of conspiracy beyond the vague allegations in her complaint. Plaintiff has not provided any facts from which this Court can infer the elements of a §1985 conspiracy claim.

In addition, in the Fifth Circuit, the courts require an allegation of race-based conspiracy to present a claim under § 1985(3). *Bryan v. City of Madison*, 213 F.3d 267, 276 (5th Cir. 2000). There is

no such allegation in this case. The claim must, then, fail.

Finally, according to the intracorporate conspiracy doctrine, a "corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994) (citation omitted). Courts in the Fifth Circuit have stated that the "'intracorporate conspiracy doctrine is equally applicable to governmental entities.'" *Suttles v. U.S. Postal Service*, 927 F. Supp. 990, 1002 (S.D. Tex. 1996) (quoting *Larson v. Miller*, 76 F.3d 1446, 1456 n.6 (8th Cir. 1996)). The intracorporate conspiracy doctrine would, therefore, bar a § 1985(3) claim against the Defendants, even if such a claim had been properly alleged and properly pled.

For all of these reasons, summary judgment is GRANTED in favor of Defendants on Plaintiff's conspiracy claim.

D.

Plaintiff argues that the TTCA allows Defendants to be held liable for the alleged tort injuries against Plaintiff and Goodman. Under the doctrine of sovereign immunity, "the State and its governmental units are immune from tort liability unless immunity has been waived by the Texas Torts Claim Act." *GLF Const. Corp. v. LAN/STV*, 414 F.3d 553, 555 n.3 (5th Cir. 2005). In other words, the TTCA "permits

liability for certain tort claims." *Id.* at 556. Defendants assert that they are entitled to summary judgment based on immunity under the TTCA.

1.

Plaintiff asserts a claim against Defendants, pursuant to the TTCA, for utilizing "personal property to inflict the damages on Decedent to wit: (1) the dog; (2) Ashabranner's gun in a negligent or grossly negligent fashion, for all of which, Defendants would be liable if such injuries and death were proximately caused by a non-governmental person under the same or similar facts and circumstances as set forth herein." (Instrument No. 27, at 8). Plaintiff argues that the "unleashing of a vicious known dog [*sic*] states a Texas cause of action for which private person [*sic*] would be liable under" Texas law. (Instrument No. 82, at 5). Plaintiff also argues that no Defendants are immune from this claim. In support of her TTCA claims, Plaintiff refers to §§ 101.001(3)[3],

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[3] Section 101.001(3) provides the definition of "Governmental unit:"

(3) "Governmental unit" means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state . . . ;

(Continued on following page)

101.025(a)[4], 101.055(3)[5], and 101.102(c)[6] of the Texas Civil Practice and Remedies Code (the "Code").

(C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

Tex. Civ. Prac. & Rem. Code § 101.001(3). This section of the Code does not provide a cause of action but only confirms that Harris County is a governmental entity under the Code.

[4] Section 101.025 of the Code states that sovereign immunity to suit is waived and abolished to the extent of liability created by Chapter 101 of the Code and that a "person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter." Tex. Civ. Prac & Rem. Code § 101.025.

[5] The section provides, "This chapter does not apply to a claim arising: . . . (3) from the failure to provide or the method of providing police or fire protection." Tex. Civ. Prac. & Rem. Code § 101.055.

[6] Section 101.102(c) provides,

(c) In a suit against the state, citation must be served on the secretary of state. In other suits, citation must be served as in other civil cases unless no method of service is provided by law, in which case service may be on the administrative head of the governmental unit being sued. If the administrative head of the governmental unit is not available, the court in which the suit is pending may authorize service in any manner that affords the governmental unit a fair opportunity to answer and defend the suit.

Tex. Civ. Prac. & Rem. Code § 101.102(c).

Defendants argue that summary judgment is appropriate on all the TTCA claims. First, Defendants argue that the TTCA claim against Ashabranner should be dismissed pursuant to § 101.106(f) of the Code because Plaintiff has sued Harris County instead.[7] Defendants contend that, in this case, Plaintiff has sued both the employer, Harris County and Constable Hickman in his official capacity, and the employee, Ashabranner. (Instrument No. 77, at 31). Defendants argue, therefore, that the claim against Ashabranner should be dismissed. (*Id.*). Defendants also argue that Plaintiff cannot pursue a negligence claim under the TTCA "based on a single event which is also alleged as a civil rights violation under Section 1983." (*Id.*). In support of this argument, Defendants refer the Court to *Drain v. Galveston County*, 979 F. Supp. 1101, 1105 (S.D. Tex. 1997). Defendants argue that the Plaintiff has sued

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[7] § 101.106(f) of the Code, which provides as follows:

> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code § 101.106(f).

Defendants "over a single event – Deputy Ashabranner's incident with Michael Goodman on April 14, 2002," so that the rule articulated in *Drain* applies. (Instrument No. 77, at 32).

Finally, Defendants argue that the TTCA claims must be dismissed because the TTCA does not provide for liability for injury caused by intentional torts. (*Id.*, at 31). Defendants assert that the TTCA only provides for liability arising out of negligence claims. (*Id.*). Defendants state that "[t]he summary judgment evidence establishes beyond all dispute that Deputy Ashabranner's conduct in releasing Nero and in shooting Michael Goodman was intentional, not negligent." (*Id.*, at 32).

2.

The proper section of the Code under which to bring a claim alleging that a police officer misused tangible property while acting within the scope of his employment is § 101.021 of the Code. *See Morin v. Moore*, 309 F.3d 316, 328 (5th Cir. 2002). Plaintiff never refers to this section of the TTCA at any point in her complaint or her response. Nevertheless, assuming once again that Plaintiff had properly stated the legal basis for her claim, the Court considers the TTCA claim against Defendants. Section 101.021 provides,

> A governmental unit in the state is liable for: . . .
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021. It is undisputed that Defendant Harris County is a governmental unit. *See* Tex. Civ. Prac. & Rem. Code. § 101.001(3).

In addition, while neither party ever discusses this point, the Court notes that the "TTCA does not provide for recovery against individuals employed by the state." *Denson v. T.D.C.J.-I.D.*, No. 12-02-00099-CV, 2003 WL 21254862, *16 (Tex. App. – Tyler, 2003) (citing *Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App. – Tyler, 1996) ("The Act does not provide for recovery against individuals employed by the State.")). A plaintiff stating a claim under the TTCA "must sue the governmental unit responsible for allegedly causing the harm." *Aguilar*, 923 S.W.2d at 744. Individual state employees are not proper parties to suits under the TTCA. *Id.* at 745. Accordingly, summary judgment is appropriate in favor of all individual Defendants on Plaintiff's TTCA claims. Only Defendant Harris County, therefore, remains for the purposes of this analysis.

To state a claim under the TTCA based on "the use of non-defective tangible personal property, the plaintiff must allege '(1) that the property was used

or misused by a governmental employee acting within the scope of his or her employment, and (2) that the use or misuse of the property was a contributing factor to the injury.'" *Morin*, 309 F.3d at 328 (quoting *Gonzales v. City of El Paso*, 978 S.W.2d 619, 623 (Tex. App. 1998) (citations omitted)). In addition, "'[t]he negligence of the government employee must be the proximate cause of the injury and must involve a condition or use of tangible personal property under circumstances where there would be private liability.'" *Id.*

Plaintiff claims that Ashabranner's use or misuse of both Nero, the dog, and his gun caused Mr. Goodman's injury and death. The Court finds that Plaintiff has sufficiently alleged the two elements of the claim: that the dog and gun were used or misused by a governmental employee acting within the scope of his or her employment, and that the use or misuse of the dog and the gun were contributing factors in Goodman's injury and death.

There is, however, another requirement that must be met under this claim. The TTCA does not apply to a claim that arises out of an intentional tort. Tex. Civ. Prac. & Rem. Code § 101.057(2). In addition, "Texas law does not allow a plaintiff to avoid the bar of governmental immunity by describing essentially intentional conduct as an act of negligence." *Lopez-Rodriguez v. City of Levelland*, 100 Fed. Appx. 272, 275 (5th Cir. 2004) (citing *Hucker v. City of Beaumont*, 144 F. Supp. 2d 696, 708 (E.D. Tex. 2001)).

Defendants argue that Ashabranner's conduct was intentional, not negligent.

Plaintiff refers to Ashabranner's "negligent or grossly negligent" conduct when discussing the TTCA claims (Instrument No. 27, at 8). Plaintiff, however, is not consistent in referring to Ashabranner's conduct as "negligent." Plaintiff refers to Ashabraner's "deliberate disregard for" the rights, safety, and welfare of Goodman. (*Id.*, at 12). This deliberateness suggests intent, rather than negligence. Plaintiff also seeks damages against Hickman and Ashabranner "for their wrongful, intentional and/or negligent or grossly negligent acts and omissions." (*Id.*, at 9). Plaintiff argues that Goodman's "injuries and death [were] also thus proximately caused by such intentional acts" of Ashabranner and the other Defendants, and Plaintiff contends that Goodman's rights were violated by "the above wrongful, intentional acts and actions of 'Ashabranner' on behalf of all Defendants." (*Id.*, at 10). Accordingly, even Plaintiff's framing of Ashabranner's alleged conduct is not consistently negligence or intentional.

Nevertheless, when a plaintiff "pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, it is a claim for an intentional tort and barred by the Texas Tort Claims Act." *Johnson v. Waters*, 317 F. Supp. 2d 726, 739 (E.D. Tex. 2004) (citing *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001)). The Court, therefore, looks beyond the Plaintiff's framing of the

conduct and considers the actual conduct to determine whether it was negligent or intentional.

The courts of this circuit have found that a police officer's use of his firearm, which results in injury, amounts to an intentional, rather than a negligent tort. *See Santiago v. City of Houston*, No. Civ. A. H-04-1103, 2005 WL 1711863, at *11 (S.D. Tex. Jul. 20, 2005); *Johnson v. Waters*, 317 F. Supp. 2d at 739 (stating that the Texas Supreme Court has found a claim evolving from a police officer's shooting, while couched in negligence, is an intentional tort claim barred by the Act). Accordingly, Plaintiff's claim that Ashabranner used or misused the gun, in violation of the TTCA, must fail because Ashabranner's actions with the gun constituted intentional conduct, not negligent conduct.

Similarly, the Texas courts have found the use of a K-9 service dog by a police officer to be intentional conduct. *City of Garland v. Rivera*, 146 S.W.3d 334, 338 (Tex. App. – Dallas, 2004). Where the plaintiff's "claims hinge on intentional conduct, as opposed to negligent conduct," the TTCA does not waive sovereign immunity. *Id.* Accordingly, Plaintiff's claim based on Ashabranner's use or misuse of the dog, Nero, must fail because such conduct constitutes an intentional tort. In addition, Texas law considers "excessive force" to be an intentional tort. *Durbin v. City of Winnsboro*, 135 S.W.3d 317, 324 (Tex. App. – Texarkana, 2004). Because Plaintiff's claims rely upon the central claim of excessive force, an intentional tort, the TTCA does not apply.

Finally, Plaintiff argues that Defendants are liable under § 101.055(3) of the TTCA for "negligent implementations of policy." (Instrument No. 27, at 9). The Plaintiff does not narrow her claim to specify what policy was negligently implemented or how.

A governmental entity may be held liable for "governmental decisions as to how to provide police or fire protection." *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979). The purpose of this exemption to immunity is to preclude "judicial review of policy decisions made by a governmental unit in charge of providing police or fire protection." *Id.* Accordingly, "only those acts or omissions which constitute the execution of or the actual makeup of those policy decisions" are excluded from the TTCA. *Id.* A governmental entity may be liable, therefore, for injuries caused when an employee negligently carries out a policy. *Terrell*, 588 S.W.2d at 788. The governmental entity is only subject to liability, however, for injuries resulting from the negligence of an officer in complying with the policies. *Id.* The Court has already determined that Ashabranner's conduct was intentional, not negligent. Accordingly, § 101.055(3) is inapplicable to the facts of this case.

Based on the foregoing reasoning, Plaintiff's claims under the TTCA all fail. Summary judgment is GRANTED in favor of Defendants on Plaintiff's TTCA claims.

E.

Plaintiff's remaining claims are all brought under § 1983. Plaintiffs allege that Defendants are liable for various violations of Goodman's constitutional rights that resulted from Defendants' alleged conduct while acting under color of state law.

Section 1983 provides a private right of action against those acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" to redress the deprivation of rights secured by the United States Constitution or federal law. 42 U.S.C. § 1983; *Monell v. Dep't of Soc. Services of New York*, 98 S. Ct. 2018, 2036 (1978). Section 1983 is not itself a source of substantive rights; it merely provides a method for vindicating already-conferred federal rights. *See Albright v. Oliver*, 114 S. Ct. 807, 811 (1994). Claims made pursuant to § 1983 must be supported by specific facts establishing a constitutional deprivation of rights, not mere conclusory allegations. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). Furthermore, the constitutional deprivation must be intentional or due to deliberate indifference, not mere negligence. *See Holland v. City of Houston*, 41 F. Supp. 2d 678, 688 (S.D. Tex. 1999).

A § 1983 action may be brought against a person in his individual capacity, a person in his official capacity, or against a governmental entity. *See Board of the County of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). Plaintiff brings § 1983 claims against all remaining Defendants. The Court,

first, addresses the claims against the individual Defendants in their official capacities; then, against Judge Eckels and the Commissioners in their personal capacities; then, against Harris County and against Hickman and Ashabranner in their personal capacities.

1.

With respect to the § 1983 claims against the Defendants Eckels, Lee, Radack, Eversole, Garcia, Hickman, and Ashabranner in their official capacities, the Court notes that suits against individual officials in their official capacities are treated as suits against the authority itself. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). An official capacity lawsuit is an action against the official's office and is no different than a suit against the governmental entity itself. *See Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989); *Brooks v. George County, Miss*, 84 F.3d 157, 165 (5th Cir. 1996) (treating suit against sheriff in official capacity as suit against county); *Casanova v. City of Brookshire*, 119 F. Supp. 2d 639, 659 (S.D. Tex. 2000) (treating suit against Chief of Police in official capacity as suit against county). Indeed, "[t]here is no longer a need to bring official-capacity actions against local government officials . . . [because] local government units can be sued directly for damages." *Kentucky v. Graham*, 105 S. Ct. 3099, 3106 n.14 (1985). Accordingly, an official capacity suit is treated as a suit against the municipality, requiring the plaintiff

to demonstrate he was deprived of a constitutional right pursuant to an official policy or custom. *See Brooks*, 84 F.3d at 165; *see also Monell v. Dep't of Soc. Services of New York*, 98 S. Ct. 2018, 2035-36 (1978); *Flores v. Cameron County*, 92 F.3d 258, 263 (5th Cir. 1996).

Harris County is also a Defendant in this case, therefore the official-capacity claims against the individual Defendants are redundant. *Kentucky v. Graham*, 473 U.S. 159, 165-55 (1985). Accordingly, the § 1983 claims against the individual Defendants, in their official capacities, are DISMISSED.

2.

Plaintiff's First Amended Complaint is not clear whether Judge Eckels and the Commissioners have been sued in their personal capacities. (Instrument No. 27). The First Amended Complaint states the following,

> Plaintiff . . . files this her cause of actions against (1) HARRIS COUNTY, TEXAS, a governmental body politic and subdivision of the State of Texas; in their official capacities (2) HARRIS COUNTY JUDGE ROBERT ECKELS, HARRIS COUNTY COMMISSIONERS (3) EL FRANCO LEE; (4) COMMISSIONER STEVE RADACK; (5) COMMISSIONER JERRY EVERSOLE; (6) COMMISSIONER SYLVIA GARCIA; in both their individual and official capacities HARRIS COUNTY PRECINCT 4 CONSTABLE (2)

> RON HICKMAN; and (3) DEPUTY PRECINCT 4 CONSTABLE TERRY ASHABRANNER, both in their official and individual capacities.

(*Id.*, at 2). The placement of the phrase "in their official capacities" appears to refer to Judge Eckels and the Commissioners, despite the inconsistent punctuation. This portion of the complaint, however, is confusing and suggests that further consideration is needed.

Plaintiff makes no reference to any claim against Judge Eckels in his individual, or personal, capacity. Accordingly, the Court finds that Judge Eckels is not being sued in his individual capacity.

Plaintiff does, however, state in the "Conspiracy" portion of the complaint that "Defendants Harris County and Defendants Commissioners, individually and as County Commissioners duly elected, aided and abetted in this conspiracy by the acquiescence in the foregoing policies and non enforcement [*sic*] of such supervision of such Constables and their deputies prior to the occurrence made the basis of this suit above." (Instrument No. 27, at 17). Accordingly, the Court finds that Plaintiff sued the Commissioners in their individual capacities, but only under the § 1983 conspiracy claim. As the Court has already determined that summary judgment is appropriate on the § 1983 conspiracy claim, the Commissioners, in their individual capacities, are DISMISSED from the case, as no other claims are lodged against them.

3.

The remaining § 1983 claims are brought against Constable Hickman and Deputy Ashabranner in their individual capacities and against Harris County.

Under § 1983, individual capacity actions, or personal capacity actions, "seek to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky*, 473 U.S. at 165. An official in a personal-capacity action may be able to assert personal immunity defenses such as qualified immunity. *Id.* at 166. Under the qualified immunity doctrine, the Court engages in a two-part analysis: (1) whether Plaintiffs have alleged the violation of a clearly established constitutional right; and (2) assuming the Plaintiffs have alleged such a violation, whether the Officer's conduct was "objectively reasonable" as measured against the law as clearly established at the time of the challenged conduct. *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001).

Plaintiff also asserts § 1983 claims against Harris County. A municipality can only be found liable under § 1983 where the municipality itself is the cause of the plaintiff's constitutional deprivation. *See City of Canton v. Harris*, 109 S. Ct. 1197, 1203 (1989). In other words, a municipal policy or custom must cause the employee to violate another's constitutional rights. *See Fraire v. City of Arlington*, 957 F.2d 1268, 1277 (5th Cir. 1992). Moreover, there must be a "direct causal link between a municipal policy or

custom and the alleged constitutional deprivation." *Id.* The plaintiff must demonstrate that the policy or custom was the proximate cause of his injury. *See Holland v. City of Houston*, 41 F. Supp. 2d 678, 698 (S.D. Tex. 1999). In addition to properly attributing the alleged conduct to the municipality, the plaintiff must establish that the municipality, through its deliberate conduct, was the "moving force" behind the alleged injury. *See Board of County Comm'rs of Bryan County v. Brown*, 117 S. Ct. 1382, 1388 (1997).

Pursuant § 1983, Plaintiff alleges that Defendants violated Goodman's Fourth, Fifth, Eighth, and Fourteenth Amendment rights. The Court addresses each of Plaintiff's individual § 1983 claims in turn. Defendants argue that all § 1983 claims against Harris County should be dismissed on summary judgment because Plaintiff cannot prove any custom or policy led to the alleged deprivations of Goodman's rights. (Instrument No. 77, at 14). Defendants argue that all § 1983 claims against Ashabranner should be dismissed on summary judgment because he is entitled to qualified immunity. (*Id.*, at 19). And Defendants argue that all § 1983 claims against Hickman should be dismissed on summary judgment because Plaintiff has presented "no evidence whatsoever that . . . Constable Hickman in [his] individual capacit[y] took any action whatsoever with regard to this matter." (*Id.*, at 30).

a.

First, Plaintiff alleges that unspecified Defendants failed to advise Goodman of his constitutional rights. (Instrument No. 27, at 10). In her response, Plaintiff clarifies that this claim addresses Ashabranner's alleged "failure to advise him of his constitutional rights to remain silent." (Instrument No. 82, at 9). Plaintiff continues, alleging that Ashabranner violated Goodman's constitutional rights by "not respecting his properly exercised right to remain silent." (*Id.*). First, this failure to respect Goodman's right to remain silent claim was not alleged in the complaint. Accordingly, it is not a viable claim in this case. Second, there are no allegations by any party in any live pleading that have any relation to Ashabranner's respect of Goodman's right to remain silent. Accordingly, the Court will only address the claim that Ashabranner failed to advise Goodman of his constitutional rights.

The only Defendant who could have advised Goodman of his constitutional rights, such as his right to remain silent, is Ashabranner. Deputy Ashabranner is the only remaining Defendant who ever spoke to Mr. Goodman. Constable Hickman alleges that he did not arrive at the scene until after Goodman had been taken to the hospital, and Plaintiff does not refute this allegation.

"Supervisory officials cannot be held liable under section 1983 for the actions of subordinates, such as [Ashabranner], on any theory of vicarious or

respondeat superior liability." *Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Constable Hickman, therefore, cannot be held liable for Ashabranner's actions. Because Hickman cannot be held liable for Ashabranner's actions, and because Hickman never interacted with Goodman, this claim against Hickman must be dismissed.

Harris County can only be held liable under this claim if the Plaintiff presents evidence of a municipal policy or custom that caused Ashabranner to violate Goodman's constitutional rights by failing to advise him of his right to remain silent. *See Fraire v. City of Arlington*, 957 F.2d at 1277. Plaintiff has not presented any evidence of any such custom or policy. The Court need not even reach the questions of causality and deliberate conduct, because Plaintiff has not presented any evidence on this claim against Harris County.

With regard to Defendant Ashabranner, the Court must determine whether he is protected by qualified immunity from this claim. Under the qualified immunity doctrine, the Court engages in a two-part analysis: (1) whether Plaintiffs have alleged the violation of a clearly established constitutional right; and (2) assuming the Plaintiffs have alleged such a violation, whether the Officer's conduct was "objectively reasonable" as measured against the law as clearly established at the time of the challenged conduct. *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001). Plaintiff asserts no arguments or facts in support of this claim, other

than making the allegation. Defendants argue that the claim should be dismissed because Plaintiff can produce no evidence to demonstrate that an officer's obligation to read the *Miranda* rights had attached. (Instrument No. 77, at 29).

The Fifth Amendment right against self-incrimination "does not attach until custodial interrogation has begun. A person in custody must, prior to interrogation, be clearly informed of his right to remain silent and his right to counsel during questioning." *United States v. Howard*, 991 F.2d 195, 200 (5th Cir. 1993) (citing *Miranda v. Arizona*, 384 U.S. 436, 437 (1966)). There is no evidence in the record that any interrogation of Goodman had commenced or that any interrogation of him ever took place. Accordingly, there is no evidence that Goodman's Fifth Amendment right against self-incrimination had attached, and there is no evidence that Goodman was entitled to being informed of his right to remain silent. The Court finds, therefore, that Plaintiff has not alleged a violation of a clearly established right in this claim. Accordingly, summary judgment on this claim is GRANTED as to all Defendants.

b.

Second, Plaintiff alleges that unspecified Defendants "deprived [Goodman] of his above constitutional rights, including to talk to an attorney." (Instrument No. 27, at 10). The complaint does not

clearly indicate what other constitutional rights were withheld from Goodman, besides the right to talk to an attorney. In her response, Plaintiff listed this claim again, alleging that Ashabranner deprived Goodman of "his right to talk to an attorney if, as they claim, he committed a felony in touching Ashabranner." (Instrument No. 82, at 9).

The analysis of this claim mirrors the analysis of the prior claim. The claim must be dismissed as to Defendant Hickman because he neither had the opportunity to deprive Goodman of this right nor can be held liable under the theory of *respondeat superior* for any violation of this right by Ashabranner. *Davis*, 406 F.3d at 381. The claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to violate Goodman's constitutional rights by depriving him of his right to talk to an attorney. *See Fraire*, 957 F.2d at 1277.

Finally, the claim must be dismissed as to Defendant Ashabranner because Goodman's Fifth Amendment right to consult with an attorney had not yet attached. *Howard*, 991 F.2d at 200. Plaintiff does not assert this claim under the Sixth Amendment, but the Court notes, nevertheless, that the "Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." *Davis v. United States*, 512 U.S. 452, 456-57 (1994) (citations omitted).

Accordingly, Goodman's Sixth Amendment right to counsel had not yet attached, either. The Court finds, therefore, that Plaintiff has not alleged a violation of a clearly established right in this claim. Summary judgment on this claim is, therefore, GRANTED as to all Defendants.

c.

Third, Plaintiff alleges that unspecified Defendants violated Goodman's "rights to privacy." (Instrument No. 27, at 10). Plaintiff does not provide more factual details to support or explain this claim. Nor does Plaintiff provide any legal argument in support of the claim. Defendant argues that there is no evidence that any constitutional right to privacy had attached in the situation which presented itself to Deputy Ashabranner. (Instrument No. 77, at 29).

The analysis of this claim mirrors the analysis of the prior claim. The claim must be dismissed as to Defendant Hickman because he neither had the opportunity to deprive Goodman of this right nor can be held liable under the theory of *respondeat superior* for any violation of this right by Ashabranner. *Davis*, 406 F.3d at 381. The claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to violate Goodman's constitutional rights by depriving him of his right to privacy. *See Fraire*, 957 F.2d at 1277.

With regard to Defendant Ashabrarmer, the Court must determine if Ashabranner is entitled to qualified immunity on this claim. Though Plaintiff does not articulate a legal argument in support of this claim, Plaintiff could assert Goodman's right to privacy under either the Fourth Amendment – which is applied to the states by the Fourteenth Amendment – or under the Supreme Court's substantive due process doctrine. *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002). The Fifth Circuit has stated, "the right to privacy consists of two interrelated strands: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" *Fadjo v. Coon*, 633 F.2d 1172, (5th Cir. 1981) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)). No facts have been alleged that trigger either of these interests. Accordingly, the Court finds that Plaintiff has not alleged a violation of Goodman's constitutional right to privacy. Defendant Ashabranner is entitled to qualified immunity on this claim, and summary judgment is GRANTED on this claim as to all Defendants.

d.

Fourth, Plaintiff alleges that all Defendants are liable for Defendant Ashabranner's allegedly "insufficient training and/or experience . . . to enable him to timely and properly handle the situation as presented to him." (Instrument No. 27, at 10-11). This claim only applies to Defendants Harris County and

Hickman, as Ashabranner can hardly be held liable for failure to train himself.

A municipality may be liable under § 1983 for inadequately training or hiring its employees. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). However, "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* The deliberate indifference standard adopted by the Supreme Court for § 1983 "failure to train" claims "does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Id.* at 389 n.8. The standard is stringent, but "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390. Accordingly, in a case such as the one at bar, the Court "must focus on the adequacy of the training of [the police officer] in relation to performing an arrest situation. And . . . [the Court] must examine the evidence for deliberate indifference of the county and not be satisfied with mere negligence in failing to train." *Brown v. Bryan County*, 219 F.3d 40, 459 (5th Cir. 2000).

Supervisory officials, such as Hickman, "cannot be held liable under section 1983 for the actions of subordinates, such as [Ashabranner], on any theory of vicarious or *respondeat superior* liability. Rather, Plaintiffs must show that the conduct of the supervisors denied [Goodman] his constitutional rights." *Davis v. City of North Richland Hills*, 406 F.3d 375, 380-81 (5th Cir. 2005). To properly allege a § 1983 claim for failure to train or supervise, "the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998).

Under this test, "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410 (1997). The official allegedly acting with deliberate indifference "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Smith*, 158 F.3d at 912. In addition, "[a]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Alton v. Tex. A&M Univ.*, 168 F.3d 196,

201 (5th Cir. 1999). Instead, to satisfy the "deliberate indifference" requirement, "a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of training is 'obvious and obviously likely to result in a constitutional violation.'" *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003) (quoting *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001)). If the plaintiff falters on the requirement of deliberate indifference, the court need not address the other two prongs of supervisory liability. *Davis*, 406 F.3d at 382.

Accordingly, the liability of both Harris County and Constable Hickman turn on the issue of deliberate indifference. Plaintiff provides no evidence whatsoever of deliberate indifference with regard to the failure to train claim. In her First Amended Complaint, Plaintiff uses the phrase "deliberate indifference" twice, and both times the phrase refers to the Defendants' alleged indifference to Goodman's medical needs. (Instrument No. 27, at 12-13) ("Defendants were deliberately indifferent to the deceased's urgent, serious, death threatening medical needs brought on and proximately caused by their above acts and/or omissions;" "Defendants 'Ashabranner' and 'Hickman' were deliberately indifferent to the deceased and to his serious medical condition."). Plaintiff, then, never addresses the failure to train claim in her response and fails to direct the Court to any portion of the record that would provide evidentiary support for the claim.

In addition, "for liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport,* 397 F.3d 287, 293 (5th Cir. 2005). Here, Plaintiff has alleged no specific deficiencies. Defendants provide summary judgment evidence detailing the training procedures for peace officers and for K-9 officers. (Instrument No. 77, Exhibits A, B, C, D). Defendants also summarize these facts in their pleadings. Plaintiff, however, offers no evidence to refute the training evidence offered by Defendants. Plaintiff fails, therefore, to meet the requirement of *Roberts* to plead inadequate training with specificity.

Accordingly, the Court finds that there is no issue of material fact with regard to Plaintiff's § 1983 failure to train claims, and summary judgment is GRANTED on those claims as to both Harris County and Constable Hickman.

e.

Fifth, Plaintiff alleges that all Defendants are liable for Ashabranner's alleged failure to "know the laws as to all and what probable cause is required for arresting a person without a warrant of arrest and/or a search warrant and/or warrant of seizure under Texas and U.S. Constitutions." (Instrument No. 27, at 11). In her response, Plaintiff couches this claim in terms of failing to train Ashabranner "as to the requirements for probable cause to stop and arrest

[Goodman] for minor misdemeanor traffic violations." (Instrument No. 82, at 9).

The analysis of this claim mirrors the analysis of prior claims. The claim must be dismissed as to Defendant Hickman because Plaintiff is not alleging that he did not know the law of probable cause and because he cannot be held liable under the theory of *respondeat superior* for any constitutional violation committed by Ashabranner. *Davis,* 406 F.3d at 381. The claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that prevented Ashabranner from knowing the law of probable cause. *See Fraire,* 957 F.2d at 1277.

As to the original presentation of the claim – that Goodman's constitutional rights were violated by Ashabranner's alleged failure to know the law as to probable cause – Plaintiff has not stated a viable cause of action. Plaintiff has not identified a constitutional right that was violated in this scenario. Accordingly, Ashabranner is entitled to qualified immunity with respect to this presentation of the claim. *Bazan,* 246 F.3d at 490. With regard to the later presentation of this claim – that Defendants failed to train Ashabranner as to the requirements of probable cause – as with the analysis above, Plaintiff has presented no evidence of deliberate indifference with regard to this claim. Accordingly, summary judgment is GRANTED on this claim as to all Defendants.

f.

Sixth, Plaintiff alleges that all Defendants are liable for Ashabranner's alleged failure to "apply for and/or obtaining a search and/or arrest warrant though [*sic*] a disinterested magistrate." (Instrument No. 27, at 11). Defendants argue that an arrest warrant is not necessary for an offense which is committed in their presence. (Instrument No. 77, at 28). Defendants contend that Goodman violated the Texas Transportation Code within view of Ashabranner and that, therefore, no arrest warrant was necessary. (*Id.*).

This claim must be dismissed as to Defendant Hickman because he neither had the opportunity to deprive Goodman of any right related to obtaining a warrant, nor can be held liable under the theory of *respondeat superior* for any violation of such a right by Ashabranner. *Davis,* 406 F.3d at 381. The claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to violate Goodman's constitutional rights by depriving him of any right related to obtaining a warrant. *See Fraire,* 957 F.2d at 1277.

The Court, then, turns to Defendant Ashabranner and whether he is entitled to qualified immunity. Under the qualified immunity doctrine, the Court first considers whether Plaintiff has alleged the violation of a clearly established constitutional right. *Bazan*, 246 F.3d at 490. As to whether a search

warrant was required, Plaintiff has not alleged that any search was conducted. In the absence of consent, a search warrant, or exigent circumstances, a search of Goodman or his property would be unlawful. *Wren v. Towe,* 130 F.3d 1154, 1158 (5th Cir. 1997). Plaintiff's failure to allege any search was conducted, however, prevents Plaintiff from asserting the violation of any constitutional right related to search warrants.

With regard to Ashabranner's failure to obtain an arrest warrant, "[I]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). A "warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 125 S. Ct. 588, 593 (2004). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Id.* The lawfulness does not turn on the motivation of the arresting officer but on the application of objective standards of conduct. *Id.*

Defendants give his claim very little weight, stating that it "deserves only a brief response." (Instrument No. 77, at 28). Defendants argue that officers do not need an arrest warrant "for an offense which is committed in their presence. In addition to

his violation of the Texas Transportation Code, Michael Goodman committed the offenses of assault and evading arrest and/or detention." (*Id.*). Defendants allege that Goodman had violated § 551.104 of the Texas Transportation Code and that this violation caused Ashabranner to choose to stop Goodman. (*Id.*, at 6). Defendants then contend that, when Ashabranner stopped Goodman, Goodman committed the offenses of assaulting an officer by pushing Ashabranner and of evading arrest or detention by riding away on his bicycle. (*Id.*, at 27).

Section 551.104 of the Transportation Code provides, in relevant part,

> § 551.104. Safety Equipment
>
> (b) A person may not operate a bicycle at nighttime unless the bicycle is equipped with:
>
> (1) a lamp on the front of the bicycle that emits a white light visible from a distance of at least 500 feet in front of the bicycle; and
>
> (2) a red reflector on the rear of the bicycle that is:
>
> (A) of a type approved by the department; and
>
> (B) visible when directly in front of lawful upper beams of motor vehicle headlamps from all distances from 50 to 300 feet to the rear of the bicycle.

Tex. Transp. Code Ann. § 551.104 (Vernon 1999). Defendants' factual account supports the finding that Goodman had violated § 551.104(b) because Defendants assert that Goodman was "riding in the roadway without any kind of light on his bicycle." (Instrument No. 77, at 6). Plaintiff offers no evidence or argument to refute this contention. Plaintiff offers no evidence relating the bicycle and whether it was outfitted in accordance with the code. Plaintiff merely states that "it is disputed legally and factually whether or not Ashabranner had authority to arrest Goodman, at least for the initial minor misdemeanor traffic violations." (Instrument No. 82, at 23). Plaintiff does not, however, provide any facts or legal basis to outline this "dispute."

It is undisputed that Goodman was riding his bicycle at night on the night of the incident. Defendant Ashabranner's affidavit, therefore, provides the only, and the uncontested, evidentiary support for the violation of the Transportation Code. While the Court is required to view all facts and draw all reasonable inferences in favor of Plaintiff, on this motion for summary judgment, *see Saucier v. Katz*, 532 US. 194, 201 (2001), the Court is not required to assume facts are contested when the Plaintiff does not address them. Accordingly, the summary judgment evidence presents no issue of material fact as to whether Goodman had violated the Transportation Code, and the Court finds that he did.

Section § 543.001 of the Texas Transportation Code provides, "Any peace officer may arrest without

warrant a person found committing a violation of this subtitle." Tex. Transp. Code Ann. § 543.001 (Vernon 1999). Ashabranner could, therefore, lawfully arrest Goodman for violating § 551.104. In fact, Texas case law supports an arrest for a violation of this very section. *See Green v. State*, 892 S.W.2d 217, 219 (Tex. App. – Texarkana, 1995) (finding that suspect's "act in riding in the middle of the street after nightfall with no lights on his bicycle constituted traffic offenses" and that the officer "had a lawful reason, independent of any suspicious activity on [the suspect's] part, to stop the bicycle and [the suspect]."). *See also Chandler v. State*, No. 05-97-00773-CR, 2000 WL 1048495, at *2 (Tex. App. – Dallas, 2000) ("Riding a bicycle at night without a headlight is specifically prohibited by the code. Thus an officer may arrest a person for riding a bicycle at night without a light.") (citation omitted); *McFarland v. State*, No. 11-96-236-CR, 1998 WL 34193644, at *2 (Tex. App. – Eastland, 1998) ("The record reflects that the police officer's attempt to stop appellant was proper because appellant was operating a bicycle without a headlamp on a public roadway at night.").

While Plaintiff contends that it's "disputed legally . . . whether or not Ashabranner had authority to arrest Goodman, at least for the initial minor misdemeanor traffic violations," Plaintiff does not provide any legal basis for that dispute. (Instrument No. 82, at 23). The Court's own research reveals that Ashabranner clearly did have authority to arrest Goodman for the initial traffic violations.

Accordingly, Ashabranner's warrantless stop and "arrest" of Goodman were lawful, and Plaintiff has failed to allege the violation of a clearly established constitutional right. *Bazan*, 246 F.3d at 490. Ashabranner is, therefore, entitled to qualified immunity. Summary judgment, therefore, is GRANTED on this claim as to all Defendants.

g.

Seventh, Plaintiff alleges that all Defendants are liable because Ashabranner allegedly "used excessive, deadly force that was objectively unreasonable," in violation of the Fourth, Fifth Eighth, and Fourteenth Amendments. (Instrument No. 27, at 11). Plaintiff argues that there "was no threat to [Ashabranner] of any harm, much less serious harm to harm [*sic*] or others or even Defendants or his dog from the deceased." (*Id.*). Later in the list of allegations, Plaintiff continues, alleging that Ashabranner "violated deceased's rights by acting with deliberate disregard for and conscious indifference to the rights, safety and welfare of the deceased, and to substantial risks of serious medical and bodily harm and resulting injuries even including the death of the deceased. [Ashabranner] had subjective knowledge of these risks of serious harm." (*Id.*, at 12-13).

Plaintiff revisits this claim again later in the list of allegations, making a string of excessive force-related allegations. (*Id.*, at 14). Plaintiff states,

> There was no necessity to shoot, much less fatally kill, decedent. He was making no thrusting or other advances toward "Ashabranner"; decedent was physically, seriously, disabled and unarmed. Decedent posed no immediate threat to "Ashabranner" or even the dog at the scene; if he fled, he would be on foot or on his bicycle, hardly equal to "Ashabranner" nearly recent model county car [*sic*]. At the least, if, arguendo, "Ashabranner's" self-defense claims were true, which it was not [*sic*], he could have nonfatally [*sic*] subdued decedent by numerous means and methods available to him, including shooting him in the foot or leg(s), or nonfatal but disabling places and/or hitting him with a club, handcuffing him, etc. Had he been trained properly and supervised by Defendants, even if, arguendo, he, "Ashabranner" was actually physically threatened, decedent would not have had to have been fatally shot, i.e., he could restrain him by non-fatal methods, up to his shoot to disable or wound, not kill [*sic*]. The threats, if any, were non-immediate present [*sic*] or life injuring or lethal to "Ashabranner" or Defendants' dog.

(*Id.*, at 14). Plaintiff continues, alleging that Goodman had not committed any violent crime, any felony, or any other crime at the time that he was shot. (*Id.*, at 14-15). Plaintiff claims there was "no deteriorating, much less rapidly deteriorating, dangerous situation facing 'Ashabranner.' If anything, it was steadily improving until 'Ashabranner' pulled his gun and

shot decedent after releasing his dog to attack Decedent." (*Id.*, at 15).

The Supreme Court has made clear that "all claims that law enforcement officials have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a citizen should be analyzed under the Fourth Amendment and its reasonableness standard rather than substantive due process approach under the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Thus, an excessive and deadly force complaint brought under §1983 must be analyzed under the Fourth Amendment. *Brosseau v. Haugen,* 125 S. Ct. 596, 598 (2004).

As an initial issue, this claim as to Hickman has no merit and must be dismissed. Hickman neither had the opportunity to deprive Goodman of any right by using excessive force, nor can be held liable under the theory of *respondeat superior* for any violation of such a right by Ashabranner. *Davis,* 406 F.3d at 381. Accordingly, this claim against Defendant Hickman is dismissed.

As to Defendant Harris County, Plaintiff must show that Harris County itself is the cause of the Plaintiff's constitutional deprivation. *See Canton,* 109 S. Ct. at 1203. In other words, Plaintiff must show that a municipal policy or custom caused Ashabranner to violate Goodman's constitutional rights. *See Fraire,* 957 F.2d at 1277. Moreover, there must be a "direct causal link between a municipal policy or

custom and the alleged constitutional deprivation." *Id.* The plaintiff must demonstrate that the policy or custom was the proximate cause of the injury. *See Holland*, 41 F. Supp. 2d at 698. In addition to properly attributing the alleged conduct to the municipality, the plaintiff must establish that the municipality, through its deliberate conduct, was the "moving force" behind the alleged injury. *See Bryan County*, 117 S. Ct. at 1388.

Plaintiff has not presented any evidence in support of finding Harris County liable for Ashabranner's alleged use of excessive force. Plaintiff does not plead any facts related to a custom or policy. Plaintiff does not allege any causal link between a Harris County custom or policy and Goodman's death. Plaintiff does not address the element of causation with regard to any custom or policy and Goodman's death. Accordingly, Harris County cannot be found liable under this claim.

Finally, the Court turns to the excessive force § 1983 claim against Ashabranner, who claims he has qualified immunity. Under the qualified immunity doctrine, the Court engages in a two-part analysis: (1) whether Plaintiffs have alleged the violation of a clearly established constitutional right; and (2) assuming the Plaintiffs have alleged such a violation, whether the Officer's conduct was "objectively reasonable" as measured against the law as clearly established at the time of the challenged conduct. *Bazan*, 246 F.3d at 490.

"The reasonableness of a particular use of force 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is unnecessary in a particular situation.'" *Johnson v. Deep East Texas Reg. Narcotics Trafficking Task Force,* 379 F.3d 293, 305 (5th Cir. 2004).

The inquiries for qualified immunity and for excessive force are distinct. *Saucier v. Katz,* 533 U.S. 194, 204 (2001). The qualified immunity inquiry has "a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* at 205. If an officer's mistake "as to what the law requires [in a particular situation] is reasonable . . . the officer is entitled to the immunity defense." *Id.*

Proceeding with the qualified immunity inquiry, the Court must assess "whether a statutory or constitutional right would have been violated on the facts alleged." *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir. 2004). If the Court finds that "a violation is properly alleged, [the Court] proceed[s] to the second step, in which [the Court] determine[s] whether the defendant's actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (citing *Hope v. Pelzer,* 536 U.S. 730, 739 (2002)). This two-step

analysis can lead to a "'somewhat schizophrenic approach,' because [the court] must apply current law to the first step and the law at the time of the incident to the second step, which may sometimes result in applying different tests to the two steps." *Id.* at 395 n.3 (citing *Petta v. Rivera,* 143 F.3d 895, 900 & n.4 (5th Cir.1998)). However, despite "the confusion this approach creates, the Supreme Court has made clear that [the court is] obliged to go through the first step of the analysis even if the second step shows that the law was not clearly established." *Id.*

To prevail on a claim of excessive force under the Fourth Amendment, a §1983 plaintiff is required to show: (1) injury, (2) which resulted directly and only from the use of force that was excessive to the need, and (3) that the force was objectively unreasonable. *Id.* at 396. The element of injury is easily met. The next inquiry is whether the injury resulted from a use of force that was excessive to the need. Viewed in a light most favorable to the nonmovant, the force was excessive to the need because Goodman was unarmed, was bleeding, and was on the ground when Ashabranner shot him. As to objective unreasonableness, the Supreme Court has stated that, with regard to deadly force, "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.' But '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'" *Brosseau,* 125

S. Ct. at 598 (quoting *Tennessee v. Garner,* 471 U.S. 1, 11 (1985)) (citation omitted).

Defendants argue that Ashabranner is entitled to qualified immunity because Ashabranner reasonably believed he was threatened with serious bodily injury or death. (Instrument No. 77, at 25). Defendants contend,

> The question is whether Mr. Goodman posed an immediate threat to Deputy Ashabranner when he was shot, and this question can only be answered yes. Here, Deputy Ashabranner had observed a tool or some type of object in Mr. Goodman's right rear pant pocket, Deputy Ashabranner had been trained on the concept of action versus reaction. Had Deputy Ashabranner waited to actually confirm and/or verify that what Mr. Goodman was reaching for was a weapon, it would have been too late for Deputy Ashabranner to effectively protect his life.

(*Id.*, at 25-26). Defendants argue that there is "no evidence to support" Plaintiff's allegation that Ashabranner used excessive force against Goodman. (*Id.*, at 21). The Court is not as confident that "no evidence" exists.

The Court finds that there are material issues of fact that prevent summary judgment and prevent the grant of qualified immunity to Ashabranner. The question of whether Ashabranner reasonably believed Goodman posed a significant threat to him is a genuine issue of material fact. *Flores,* 381 F.3d at 399.

Defendants state that "Mr. Goodman pushed Deputy Ashabranner with what Deputy Ashabranner believes was his left hand, causing him to drop his handcuffs and fall to the ground." (Instrument No. 77, at 24). Mrs. Goodman, however, alleges that Ashabranner was "far from being ambidextrous" and was "very clumsy" as a result of using his left hand. (Instrument No. 82, Exhibit 3, at 2). Defendants also state that "[a]fter Mr. Goodman pushed Deputy Ashabranner, he reached back with his right hand and appeared to be drawing or pulling the weapon or object Deputy Ashabranner had observed in his rear pants pocket." (Instrument No. 77, at 25). But Mrs. Goodman alleges that Goodman "had received a gun shot wound to his dominant right arm less than four months prior to this incident. He had almost no use of it." (Instrument No. 82, Exhibit 3, at 2). It is not clear to the Court that Ashabranner had probable cause to believe that Goodman posed a threat of serious physical harm to Ashabranner or to others.

Defendants also argue that the totality of the circumstances supported Ashabranner's conclusion that Goodman posed a threat of serious harm to Ashabranner. (Instrument No. 77, at 26). Defendants' rendition of this totality of circumstances is,

> Mr. Goodman had been riding the bicycle on the wrong side of the road in the middle of the lane; Mr. Goodman had been riding the bicycle at approximately 11:30 pm without the required light; Mr. Goodman was wearing gloves in April; Mr. Goodman was

> wearing all over dark clothing; Mr. Goodman appeared to ignore Deputy Ashabranner's presence and verbal communication; Mr. Goodman appeared nervous; and Deputy Ashabranner observed what he believed was some type of tool in Mr. Goodman's right rear pocket. . . . Mr. Goodman had committed the offense of assault; Mr. Goodman had committed the offense of evading arrest or detention; Mr. Goodman had fled on an isolated and dark wooded trail; Mr. Goodman had attempted to kill Nero by holding him underwater; Mr. Goodman told Deputy Ashabranner repeatedly he was going to kill his dog; Mr. Goodman would not comply with Deputy Ashabranner's verbal commands; Mr. Goodman assaulted Deputy Ashabranner for a second time by pushing or striking him down to the ground; Mr. Goodman remained in close proximity to Deputy Ashabranner; Mr. Goodman turned and reached for his rear pant pocket where Deputy Ashabranner had previously seen an object or tool of some time and perceived it was a deadly weapon.

(Instrument No. 77, at 26-27). The Court is not persuaded that, even if all these allegations were true, that they would support a finding that Ashabranner had probable cause to believe that Goodman posed a threat of serious harm. Viewed in a light most favorable to the nonmovant, the facts are even less persuasive to the Court. Accordingly, the Court does not grant qualified immunity to Ashabranner on the deadly force claim.

Summary judgment is GRANTED on this claim as to Defendants Harris County and Constable Hickman. Summary judgment is DENIED on this claim as to Defendant Ashabranner.

h.

Eighth, Plaintiff alleges that all Defendants are liable because of Ashabranner's alleged failure to comply with Goodman's "due process right to necessary, immediate lifesaving medical care from severe dog bites and being shot." (Instrument No. 27, at 11). Later in the list of allegations, Plaintiff alleges that Defendants are liable because there were all "deliberately indifferent to the deceased's urgent, serious, death threatening medical needs brought on and proximately caused by their above acts and/or omissions." (*Id.,* at 12). Later, Plaintiff alleges in another portion of the complaint that "Defendants 'Ashabranner' and 'Hickman' were deliberately indifferent to the deceased and to his serious medical condition; no ambulance or EMS Emergency Medical Services or the nearest Fire Department that was called was equipped and trained to render emergency first aid and treatment until he could get to the nearest hospital." (*Id.*, at 13). Plaintiff asserts that Ashabranner and Hickman "intended to cause delay by [their] inactions" with regard to getting medical treatment for Plaintiff, and Plaintiff argues that these two officers caused "the speedier death" of Goodman through their alleged delay. (*Id.*, at 14).

As to Defendant Hickman, the only summary judgment evidence relating to him proves that he was not present at the scene at any time when Goodman was present. Despite Plaintiff's conclusory allegation, therefore, that Hickman was indifferent to Goodman's medical condition and that Hickman intended to cause delay by his inaction, there is no factual allegation to support this claim against Hickman. The claim must be dismissed as to Defendant Hickman because Plaintiff has not pled any facts to support the allegation that Hickman in any way interfered with Goodman's medical care, and because Hickman cannot be held liable under the theory of *respondeat superior* for any constitutional violation committed by Ashabranner. *Davis,* 406 F.3d at 381. In addition, the claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that negatively impacted Goodman's access to medical care. *See Fraire,* 957 F.2d at 1277.

Defendant Ashabranner asserts the defense of qualified immunity to this claim. As stated previously, under the qualified immunity doctrine, the Court engages in a two-part analysis: (1) whether Plaintiffs have alleged the violation of a clearly established constitutional right; and (2) assuming the Plaintiffs have alleged such a violation, whether the Officer's conduct was "objectively reasonable" as measured against the law as clearly established at the time of the challenged conduct. *Bazan*, 246 F.3d at 490. Even assuming that Plaintiff had established

that a constitutional violation had occurred, Ashabranner is entitled to qualified immunity on this claim because his actions were objectively reasonable. The summary judgment evidence shows that Goodman was taken by Life Flight to a hospital, and that Ashabranner "immediately called Precinct 4 for additional units and for an ambulance for Mr. Goodman. [Ashabranner's] call to the Precinct 4 dispatcher for medical assistance was made within a second or seconds of the shooting." (Instrument No. 77, Exhibit A, at 6). Plaintiff argues that these allegations are untrue, but she provides no evidentiary support for her conclusory allegations.

Accordingly, the Court finds that Ashabranner's conduct was objectively reasonable and that no issue of material fact prevents the Court from granting summary judgment on this claim. Summary judgment is, therefore, GRANTED on this claim as to all Defendants.

i.

Ninth, Plaintiff alleges that all Defendants are liable because of Ashabranner's alleged "deliberate indifference to [Goodman's] risk of serious medical harm and resulting severe injuries and/or death. 'Ashabranner' had or should have had objective and subjective knowledge of the risks of serious, if not fatal harm and death." (Instrument No. 27, at 12).

The analysis of this claim mirrors the analysis of prior claims. The claim must be dismissed as to

Defendant Hickman because he neither had the opportunity to deprive Goodman of any right related to his risk of harm, nor can be held liable under the theory of *respondeat superior* for any violation of such a right by Ashabranner. *Davis,* 406 F.3d at 381. In addition, the claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to violate one of Goodman's constitutional rights by being deliberately indifferent to Goodman's risk of serious medical harm. *See Fraire*, 957 F.2d at 1277. And the claim must be dismissed as to Ashabranner because he is entitled to qualified immunity: Plaintiff has not established that any clearly established constitutional right of Goodman's was violated under this claim. *Bazan,* 246 F.3d at 490. Accordingly, summary judgment is GRANTED on this claim as to all Defendants.

j.

Tenth, Plaintiff alleges that Defendants are liable for "failing to promulgate any policies or reasonable policies for the evacuation of and prompt treatment of" Goodman. (Instrument No. 27, at 12). Plaintiff provides no legal support for this claim.

Section 1983 provides for liability when a municipal policy or custom causes an employee to violate another's constitutional rights. *See Fraire*, 957 F.2d at 1277. And § 1983 provides for liability for inadequately training or hiring its employees. *Canton,*

489 U.S. at 389. However, the Court is not aware of any precedent that supports the argument that § 1983 provides for liability for failure to promulgate any particular policy. Because the Plaintiff provides no legal support for this allegation, the claim must fail. Summary judgment is GRANTED on this claim as to all Defendants.

k.

Eleventh, Plaintiff alleges that Defendants are liable because Ashabranner allegedly failed to "pursue or use numerous alternative courses of non-fatal action. Instead, with all Defendants' prior policy and procedure approval, he used excessive lethal force under all of the above circumstances where it was objectively unreasonable and constitutionally prohibited." (Instrument No. 27, at 12). It is unclear whether this is an allegation of failure to use other courses of action, of excessive force, or of unconstitutional policy and procedure.

The claim must be dismissed as to Defendant Hickman because he neither had the opportunity to deprive Goodman of any right related to the pursuit of non-fatal action, nor can be held liable under the theory of *respondeat superior* for any violation of such a right by Ashabranner. *Davis,* 406 F.3d at 381. In addition, the claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to violate one of Goodman's

constitutional rights by failing to pursue non-fatal action. *See Fraire*, 957 F.2d at 1277. And the claim must be dismissed as to Ashabranner because he is entitled to qualified immunity: Plaintiff has not established that any clearly established constitutional right of Goodman's was violated under this claim. *Bazan*, 246 F.3d at 490. In fact, Plaintiff has not established any clear cause of action under this claim, constitutional or otherwise. Accordingly, summary judgment is GRANTED on this claim as to all Defendants.

l.

Twelfth, Plaintiff alleges that Defendants are liable because "'Ashabranner' later on obstructed justice by fraudulently concealing and attempted to conceal their acts [*sic*] by using a fraudulent 'throw-down' or planted gun in the nearby water to imply that the deceased was armed, when in truth in fact [*sic*] he was not ever armed." (Instrument No. 27, at 13). Plaintiff continues, stating, "Given deceased's above serious prior physical disability to his dominate right hand and arm [*sic*] and being on a bicycle, decedent was not in a reasonable position or situation to fire a gun even if he had had one, which he did not."[8] (*Id.*). Plaintiff alleges that Defendants have

[8] With regard to Plaintiff's allusion to Goodman's "serious prior physical disability," Plaintiff never discusses or presents the factual support for this disability in the complaint or in any other briefing. The Court assumes this reference is to the

(Continued on following page)

used "[t]his 'throw down' gun . . . previously to cover up falsely, and conceal homicides and needless and/or negligent intentional killings." (*Id.*).

This claim must be dismissed as to Defendant Hickman because Plaintiff does not allege that he obstructed justice by planting a gun anywhere, nor can Hickman be held liable under the theory of *respondeat superior* for any obstruction of justice by Ashabranner. *Davis,* 406 F.3d at 381. In addition, the claim must be dismissed as to Defendant Harris County because Plaintiff has presented no evidence of a municipal policy or custom that caused Ashabranner to obstruct justice by planting this gun. *See Fraire,* 957 F.2d at 1277. And the claim must be dismissed as to Ashabranner because Plaintiff has presented no evidence that Ashabranner planted any gun. To the extent that there is any evidence of a planted gun, that may be relevant to the issue of whether Ashabranner's conduct was objectively reasonable, but it does not create a separate cause of action.

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gunshot wound that Mrs. Goodman mentions in her affidavit. (Instrument No. 82, Exhibit 3, at 2). The Court notes for the record that Plaintiff's allusion to Goodman's physical disability is made in the First Amended Complaint (Instrument No. 27), where there are no facts to support the random reference. The allegations about Goodman's gunshot wound are not provided to the Court until Mrs. Goodman's affidavit is attached to her Response to Defendant's Motion for Summary Judgment (Instrument No. 82), filed nearly nine months after the First Amended Complaint.

Summary judgment is GRANTED on this claim as to all Defendants.

m.

Thirteenth, Plaintiff alleges that Defendants are liable for their "[f]ailure to have any policies or procedures in place to guide its deputy constables in handling the matter and line of non-deadly force." (*Id.*, at 15). Plaintiff provides no legal support for this claim.

As stated previously, § 1983 provides for liability when a municipal policy or custom causes an employee to violate another's constitutional rights. *See Fraire,* 957 F.2d at 1277. And § 1983 provides for liability for inadequately training or hiring its employees. *Canton,* 489 U.S. at 389. However, the Court is not aware of any precedent that supports the argument that § 1983 provides for liability for failure to promulgate any particular policy. Because the Plaintiff provides no legal support for this allegation, the claim must fail. Summary judgment is GRANTED on this claim as to all Defendants.

n.

Fourteenth, Plaintiff alleges Defendants are liable for retaining Ashabranner as a "deputy outback when Hickman, his immediate employer, should have known of Ashabranner's incompetence and prior uses of excessive force." (Instrument No.

27, at 15). Plaintiff presents no evidence of any prior uses of excessive force on the part of Ashabranner. Defendant Hickman states in his affidavit that he is "unaware of any prior uses of excessive force by Deputy Ashabranner, or any use of excessive force whatsoever by Deputy Ashabranner." (Instrument No. 77, Exhibit B, at 5).

Defendant Ashabranner is entitled to summary judgment on this claim because he cannot be held liable for hiring or retaining himself. As to Defendant Harris County, "[u]nder certain circumstances, . . . a municipality may incur § 1983 liability for its employees' acts when a municipal policy of hiring or training causes those acts." *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir. 1992). In order to make out this claim, the plaintiff "must show that (1) the training or hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury." *Id.*

Plaintiff has failed to show either that Harris County acted with deliberate indifference in hiring Ashabranner, or that any policy or custom on the part of Harris County resulted in a constitutional violation. Accordingly, this claim against Harris County is without merit.

As to Defendant Hickman, "[o]nly where adequate scrutiny of an applicant's background would

lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" *Bryan County v. Brown,* 520 U.S. 397, 411 (1997). Liability based on the decision to hire someone "must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." *Id.,* at 412. Plaintiff has not provided any evidence in support of any of these elements. There is no evidence that Hickman had anything to do with hiring Ashabranner; no evidence that Hickman may be considered a policymaker; no evidence that adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire Ashabranner would be the deprivation of a third party's federally protected right; and no evidence of deliberate indifference. *See Bryan County,* 520 U.S. at 411. Nor is there any evidence from which the Court or a jury could find that this officer, Ashabranner, was likely – let alone highly likely – to inflict this particular alleged injury on anyone. Accordingly, the claim against Hickman fails.

Summary judgment is GRANTED on this claim as to all Defendants.

IV.

Based on the foregoing, Defendants' Motion for Summary Judgment **(Instrument No. 77)** is **GRANTED in part** and **DENIED in part**. Plaintiff's § 1983 claim of excessive force against Defendant Ashabranner is the only claim that remains, all other claims are DISMISSED. In addition, Defendants' Motion to Strike Exhibit to Plaintiff's Supplemental Response **(Instrument No. 90)** is **GRANTED**; and Defendants' Motion to Strike **(Instrument No. 85)** is **GRANTED**.

The Clerk shall enter this Order and provide a copy to all parties.

Signed on this the 26th day of August, 2005, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEANETTE GOODMAN INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL W. GOODMAN, DECEASED	§	
Plaintiff,	§	**CIVIL ACTION NO. H-03-4198**
versus	§	
DEPUTY CONSTABLE TERRY ASHABRANNER	§	
Defendant.	§	

FINAL JUDGMENT

On the 28th day of September, 2007, the above-styled and numbered case came on for trial. Both sides appeared and announced ready for trial, and the case was tried to a jury, one having been timely requested, from September 24 to September 28, 2007. At the conlusion of Plaintiff Jeanette Goodman's case in chief, Defendant Deputy Constable Terry Ashabranner moved for judgment as a matter of law as to Plaintiff's claims. Fed. R. Civ. P. 50(a). The Court denied Defendant's motion. The case was submitted to the jury on September 28, 2007.

The jury questions and answers were as follows:

JURY QUESTION NO. 1

Do you find by a preponderance of the evidence that Defendant Deputy Constable Terry Ashabranner's use of force was clearly excessive to the need and was objectively unreasonable?

YES

Answer "Yes" or "No"

If you have answered "No", do not answer any more questions. Please sign and date the Certificate and return it to the Court.

However, if you have answered "Yes," please answer Question No. 2.

JURY QUESTION NO. 2

What sum of money, if any, do you find from a preponderance of the evidence should be awarded to Plaintiff as compensatory damages for Deputy Ashabranner's use of force against Michael Goodman?

Consider each element separately. Do not include damages for one element in another element. Answer in dollars and cents, if any.

Estate of Michael Goodman

Pain and Suffering and Mental Anguish:	**$250,000.00**
Funeral Expenses:	**$4,000.00**

Jeanette Goodman, Individually

Loss of Companionship and Mental Anguish in the Past:	**$500,000.00**
Loss of Companionship and Mental Anguish in the Future:	**$1,246,000.00**

Please proceed to Question No. 3.

JURY QUESTION NO. 3

Do you find from a preponderance of the evidence that Deputy Ashabranner acted with malice or willfulness or with callous and reckless indifference to the safety or rights of Michael Goodman in his use of force against Michael Goodman?

YES

Answer "Yes" or "No"

If you have answered "No", do not answer any more questions. Please sign and date the Certificate and return it to the Court.

However, if you have answered "Yes," please answer Question No. 4.

JURY QUESTION NO. 4

What sum of money, if any, do you find from a preponderance of the evidence should be awarded to Plaintiff as punitive damages for Deputy Ashabranner's use of force on the Deceased Michael Goodman?

Answer in dollars and cents,
if any: **$3,000,000.00**

Based on the verdict of the jury, the Court **ENTERS** the following judgment:

Judgment is **GRANTED** in favor of Plaintiff Jeanette Goodman on her claim that Defendant Deputy Ashabranner violated her deceased son's, Michael Goodman's, constitutional right to be free from excessive force, in the amount of $2,000,000.00 for compensatory damages and $3,000,000.00 for punitive damages.

Post judgment interest shall accrue at a rate of 4.11% per annum from the date of judgment until paid.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this 1st day of October, 2007.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20816

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ED EMMETT, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; JERRY EVERSOLE, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner; RON HICKMAN, Harris County Precinct 4 Constable

Defendants-Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 06/09/09, 5 Cir., ___, ___, F.3d ___)

(Filed Aug. 7, 2009)

Before WIENER, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge